

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

STATE OF NEW JERSEY, et al,                   CIVIL ACTION NUMBER:  
Plaintiff,   2:23-cv-03885-LMG-LDW  
v.   ORAL ARGUMENT

UNITED STATES DEPARTMENT OF  
TRANSPORTATION, et al,  
Defendant.

Frank Lautenberg Post Office & U.S. Courthouse  
2 Federal Square  
Newark, New Jersey 07102  
Thursday, April 4, 2024  
Commencing at 9:32 a.m.

B E F O R E:                   THE HONORABLE LEO M. GORDON  
UNITED STATES COURT OF INTERNATIONAL TRADE

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1 (This matter was held before the Honorable Leo M.  
2 Gordon, of the United States Court of International Trade.)

3 THE COURT: You may be seated.

4 Good morning, everyone.

5 We are going to pick up where we left off yesterday.

6 I have one or two administrative things that I wish to  
7 take care of before we commence the proceeding.

8 Yesterday there was a discussion around the number of  
9 counties that were, I think, initially looked at, and there may  
10 have been a reference to 28 counties, and I may have misspoken  
11 and said that it was 26 counties.

12 Mr. Cumming, I suspect you are in the best position to  
13 clarify for the Court what the correct number is.

14 MR. CUMMING: I believe it is 28, but I will defer to  
15 Ms. Knauer on that.

16 MS. KNAUER: 28 is correct.

17 THE COURT: 28 is correct?

18 MS. KNAUER: For the regional study area.

19 THE COURT: Melissa, would you please note the number  
20 should be 28 instead of 26.

21 Very good.

22 We are going to pick up this morning with our finishing  
23 comments on air quality and environmental justice. Things  
24 might have appeared a tiny bit rushed at the end of the day.

25 Ms. Knauer, I'm going to give you about seven minutes to

1 finish your affirmative argument.

2 Then Mr. Cumming, I'm going to ask you to approach the  
3 podium and address issues where there were questions yesterday  
4 when you were not at the moment able to provide answers. I  
5 trust that you have got the appropriate clarifications. You  
6 will advise the Court and other counsel appropriately.

7 Then we will proceed to rebuttal so everybody will be on  
8 a common footing.

9 Any objections?

10 One last thing, Mr. Chertok, at the end of yesterday's  
11 proceeding, you raised a question about the slides that were  
12 being presented to the Court yesterday. I would ask that you  
13 hold any colloquy with the Court about that until we get  
14 towards the end of today. Then I will entertain any comments  
15 or requests from you before we do closing argument, and then we  
16 will proceed to closing argument.

17 Does that work for you?

18 MR. CHERTOK: That's fine, your Honor. Thank you.

19 THE COURT: You are welcome.

20 Does any counsel have any other administrative or quasi  
21 administrative issue that they wish to address with the Court  
22 before we commence with argument this morning? Plaintiff or  
23 plaintiff intervenors?

24 MR. MASTRO: No, your Honor.

25 THE COURT: Government defendants?

1 MR. CUMMING: No, your Honor.

2 THE COURT: Defendant intervenor?

3 MR. CHERTOK: No, your Honor.

4 THE COURT: Defendant Amici?

5 MR. OTIS: No, your Honor.

6 THE COURT: Ms. Knauer, you are up for seven minutes.

7 Before you start, are you intending to hand out  
8 anything?

9 MS. KNAUER: Yes. We have one handout for everybody  
10 and then there is one page from the record that we don't have  
11 enough copies for everyone, but it is from the administrative  
12 record. Everyone should have it.

13 THE COURT: Are any of these documents duplicative of  
14 what you handed out yesterday before you began --

15 MS. KNAUER: No.

16 THE COURT: -- your presentation?

17 MS. KNAUER: No. It is an additional document.

18 THE COURT: Thank you.

19 MR. MASTRO: Your Honor, I am sorry. I have been  
20 handed something. I don't know what it is or where it is from.

21 MS. KNAUER: I will explain it.

22 MR. MASTRO: We are going outside the administrative  
23 record?

24 THE COURT: You know what? Mr. Mastro, I appreciate  
25 your concern.

1           Let Ms. Knauer refer to these and if you have an  
2           objection, we will deal with it. This is in the form of a  
3           PowerPoint presentation. It may be the other side of the same  
4           coin raised by Mr. Chertok, so I will be more than happy to  
5           hear either of you or both of you at an appropriate point in  
6           time.

7           MS. KNAUER: I will say that this material was  
8           referenced in our briefing. So it's not something that's being  
9           introduced today.

10          THE COURT: That is not the question, Ms. Knauer.

11          MS. KNAUER: I will -- I can --

12          THE COURT: If it is in the record, it is in the  
13          record. If it is not in the record, I will ask you to  
14          acknowledge that it is not in the record and the Court will  
15          deal with it appropriately.

16          MS. KNAUER: Okay. Thank you, your Honor.

17          This is in the record.

18          As we were concluding yesterday, I think that the  
19          question on the table that had been raised by Mr. Mastro was in  
20          terms of the Environmental Justice Communities with truck  
21          traffic proximity increases. There were sort of two lists in  
22          the EA, one of a greater number and one of a lesser number,  
23          which was identified for place-based mitigation.

24          So I think we were all getting a little tired at the end  
25          of the day. So I just wanted to go over that one more time and



1 also to point to the Court to one more table that's in the EA  
2 that lays that out with a little bit more clarity.

3 Again, just to review, this was the map that shows all  
4 of the environmental justice tracts with high pre-existing  
5 burdens that had either increases or decreases in truck traffic  
6 proximity.

7 The orange ones are the ones that were identified to  
8 have increases in truck traffic proximity with either chronic  
9 disease or pollutant burdens. As I said yesterday, basically  
10 the entirety of the study area has high pollutant burdens.

11 Then just going to the next map, so this is the -- these  
12 are the communities or the census tracts that have both high  
13 pre-existing pollutants and chronic disease burdens at the  
14 90th percentile. These were the ones that were identified for  
15 place-based mitigation. That is the difference.

16 If you could just --

17 THE COURT: Let's roll back.

18 The first map, in short form language, relative to  
19 New Jersey is the 15 communities and the second map is the four  
20 communities?

21 MS. KNAUER: Sorry. 15 census tracts and seven census  
22 tracts. I don't know if the communities and municipalities are  
23 different. I think they might still be in the same four  
24 municipalities.

25 In any event, that explains the difference. There is

1 also a table. I think Mr. Mastro had presented a table that  
2 listed all of the census tracts, all of the communities that  
3 had -- and all of the burdens sort of mixed together. This was  
4 to present the sort of first set of census tracts and  
5 communities that were affected.

6 And then what was not presented yesterday by either  
7 Mr. Mastro or myself is another table that's in the EA, which  
8 clarifies the census tracts and communities that were within  
9 the chronic disease subset.

10 THE COURT: That's the table from yesterday's  
11 material.

12 MS. KNAUER: This is the table from yesterday. You  
13 see that it says, Number of Tracts by Number of Pre-Existing  
14 Pollutants or Chronic Disease Burden.

15 THE COURT: Well, you can see it. Unfortunately, I  
16 have old, tired eyes, so I am at a little bit of a  
17 disadvantage.

18 MS. KNAUER: I'm sorry. I don't think we included  
19 that in our handouts.

20 THE COURT: What, that I have old 72-year old tired  
21 eyes?

22 MS. KNAUER: I did hand you the -- I think the one  
23 that you haven't seen before.

24 THE COURT: This is in new table for today?

25 MS. KNAUER: Correct. That one, it includes only the

1 census tracts and communities that were identified as also  
2 having high chronic disease burdens. Those were the ones that  
3 because they -- the mitigation was directed towards addressing  
4 communities that would be affected by the project but also have  
5 pre-existing chronic disease burdens that -- you know,  
6 essentially, the concern over any air quality effects is human  
7 health. So those were the ones that were identified  
8 specifically for place-based mitigation recognizing that the  
9 regional mitigation measures would also benefit the other  
10 communities.

11 THE COURT: You are about halfway through your time,  
12 Ms. Knauer.

13 MS. KNAUER: So the other question that the Court had  
14 posed yesterday concerning the air-quality analysis  
15 specifically was the different scenarios that were used as  
16 worst cases for the different types of analyses, and I did want  
17 to preface that New Jersey has not questioned the use of  
18 different worst cases. I think they actually are advocating  
19 that even more worst case scenarios should be used in the  
20 regional analysis on a county-by-county level. So I think this  
21 was a question that the Court asked.

22 We did -- it was challenging to find exactly analogous  
23 cases on an overnight basis, but I did want to point the Court  
24 to a case that I think the most on point one that we cited in  
25 our reply brief, which was *Coalition for a Sustainable 520 v.*

1 U.S. DOT 881 F Supp. 2d 1243 from the Western District of  
2 Washington in 2012.

3 That really, while it didn't involve the use of  
4 different worst case scenarios because the project didn't --  
5 you know, the EIS in that instance wasn't examining a project  
6 that had multiple potential scenarios. It did recognize the  
7 reasonableness of the agency's use of worst case intersections  
8 for the hot spot analysis, as was done in this case in  
9 accordance with EPA's hotspot PM 2.5 hotspot analysis  
10 methodology.

11 Then there are also a number of other cases just  
12 recognizing the concept of using the worst case analysis in  
13 NEPA reviews, worst case scenario in NEPA reviews.

14 And then the one thing -- so the other handout that I  
15 wanted to present, because the Court has been, I think, in many  
16 instances asking for greater context around other types of  
17 reviews on highway projects and others. I wanted to put some  
18 of the challenges that New Jersey has raised in the context of  
19 reviews that they have done, and one --

20 THE COURT: The reviews that...

21 MS. KNAUER: That New Jersey has completed more  
22 recently, and then this was an EIS for a recent highway  
23 project, the 14 --

24 THE COURT: Stop.

25 This does not have a DOT number, so this document is not

1 in the record?

2 MS. KNAUER: That's correct.

3 It is not in the administrative record. It was  
4 referenced in our brief, our reply brief, however. So it's  
5 not -- we're not bringing up a new argument.

6 THE COURT: Go ahead.

7 Mr. Mastro, you rose.

8 MS. KNAUER: I am sorry. I can't see behind me.

9 THE COURT: I wanted to let you finish your sentence  
10 before I...

11 Mr. Mastro, you wish to be heard?

12 MR. MASTRO: I am sorry, your Honor.

13 This document is not only a part of the administrative  
14 record, it wasn't in the context of a federal project.

15 This was something that New Jersey did itself in  
16 connection with a New Jersey-related project. It has nothing  
17 to do with this case and while I want to give lots of latitude  
18 and if she wants to present it, I just want you to understand  
19 the context to give it the weight it deserves, which is zero.

20 THE COURT: Ms. Knauer, you may continue.

21 MS. KNAUER: I will note that Mr. Mastro, I think on  
22 one of his slides yesterday, presented a list of other projects  
23 that are not -- also not in the administrative record.

24 THE COURT: Trust me, folks, when we get to the end of  
25 the day or if you press earlier in the day, the Court has an

1 idea as to what it is going to say to you all, but I want to  
2 hear what you have to say about -- shall I say any part of any  
3 presentation that would be the equivalent of a PowerPoint  
4 presentation about how the Court is going to deal with that.

5 MS. KNAUER: I think that this document, which is  
6 portions of the -- the EIS that New Jersey completed for  
7 Turnpike interchanges 14 to 14A, which was -- included a  
8 widening of that part of the Turnpike, does sort of put into  
9 context some of the challenges that they have made here.

10 One of the challenges they have made is to the --

11 THE COURT: One minute, Ms. Knauer.

12 MS. KNAUER: -- environmental justice study area,  
13 which in our case extended across -- even for the local study  
14 area extended across ten counties.

15 Theirs was a quarter mile from the physical built  
16 project, notwithstanding it was a highway project.

17 Their air-quality analysis for environmental justice  
18 consists of one paragraph. That's on the second page of the  
19 handout and relies exclusively on compliance with the National  
20 Ambient Air Quality Standards whereas the -- the environmental  
21 justice analysis completed for -- for the CBD TP went way  
22 beyond that in looking at the truck traffic proximity  
23 increases.

24 THE COURT: Thank you, Ms. Knauer. I appreciate it.

25 Mr. Cumming, you are up to clarify and answer questions

1 the Court asked yesterday.

2 Mr. Cumming, I will give you seven minutes.

3 MR. CUMMING: Your Honor, you asked whether the  
4 re-evaluation will be published.

5 The answer is yes. It will be available on MTA's  
6 website as would the other NEPA documents in this case.

7 I have some numbers for your Honor about how other VPPP  
8 agreement projects have been treated under NEPA.

9 There are -- I am looking at -- let's see here --  
10 11 projects across the country. Seven were analyzed under what  
11 are called categorical exclusions. Three were assessed under  
12 EA FONSIIs, like this project, and one was assessed under EIS.  
13 That was the I-10 Highway project in, I believe, Austin, Texas,  
14 which was a significant major construction project adding  
15 numerous lanes.

16 Your Honor asked about how Federal Highway prepares NEPA  
17 documents. I am referencing the agency's fiscal year 2022  
18 report to Congress. That is the last available most accurate  
19 public information.

20 The agency prepared 13,192 categorical exclusions,  
21 952 documented categorical exclusions, 60 EAs and FONSIIs and  
22 eight EISSs.

23 THE COURT: This is contained in a document filed with  
24 Congress by the Federal Highway Administration. Correct?

25 MR. CUMMING: Yes, your Honor.

1 THE COURT: Is it a lengthy document or can this  
2 information be extracted simply and provide it the Court and  
3 the parties.

4 MR. CUMMING: We are happy do to try to do that,  
5 your Honor.

6 THE COURT: Please do so by next Friday.

7 MR. CUMMING: Yes, your Honor.

8 THE COURT: Thank you. I appreciate it.  
9 Anything else, Mr. Cumming?

10 MR. CUMMING: You asked how many re-evaluations the  
11 agency conducts. That information is not in the report to  
12 Congress, but I talked to the agency and roughly 2- to 3,000  
13 re-evaluations are conducted annually.

14 Your Honor asked about tolling projects and particularly  
15 across state projects. There is a recent decision from the  
16 District of Maryland as of two weeks ago, Federal -- *Sierra*  
17 *Club v. Federal Highway Administration*, 2024, Westlaw 1194382  
18 that describes the 495 hot lane project stretching between  
19 Virginia and Maryland across the Potomac River. And this is  
20 not a cross state project, but it is a similar tolling project.  
21 Rhode Island installed variable tolling. That project was  
22 assessed an EA. Again, this is not a VPPP program, but that  
23 was assessed at 83 Federal Register 2867.

24 THE COURT: Repeat that, please. 83 Fed Reg...

25 MR. CUMMING: 2867.



1 THE COURT: Thank you.

2 MR. CUMMING: There was no NEPA litigation about that  
3 project, but there was commerce clause litigation about the  
4 project and there is a case, *American Trucking Association*, 630  
5 F Supp. 3d 357 from the District of Rhode Island in 2022, that  
6 describes the project and notes that is also project that's  
7 genesis was in a state legislative action.

8 THE COURT: Okay.

9 MR. CUMMING: Thank you, your Honor.

10 THE COURT: Thank you.

11 We're now at rebuttal. If my memory serves me  
12 correctly, Mr. Mastro, you reserved 10 minutes.

13 MR. MASTRO: Yes, your Honor.

14 Your Honor, I will start where we left off on past  
15 practice just so we're clear.

16 All of this information pulled off --

17 THE COURT: Mr. Mastro, do me a favor, please?

18 MR. MASTRO: Yes.

19 THE COURT: The microphone. So pass out what you need  
20 to pass out, and then you may proceed.

21 Mr. Mastro, you may proceed. Ten minutes.

22 MR. MASTRO: Thank you, your Honor.

23 I'll -- very briefly.

24 THE COURT: Make sure you lift the mic up closer to  
25 you, please. Thank you.

1 MR. MASTRO: Yes, your Honor.

2 THE COURT: Appreciate it.

3 MR. MASTRO: Very briefly, following up on what FHWA's  
4 counsel just said, acknowledging that at least one of the  
5 projects he considers in the same class, FHWA did an EIS, this  
6 project, of course, being unprecedented in the nation's  
7 history.

8 But I just want to point out, we have also had, over the  
9 last decade, at least eight other projects in New York State  
10 that FHWA required having an EIS, including simply creating  
11 an -- an additional access lane into JFK Airport. I  
12 respectfully suggest that a project of this magnitude --

13 THE COURT: But those were all construction projects.  
14 Correct?

15 MR. MASTRO: Correct, your Honor.

16 But that is in this instance, I believe, since this is  
17 the first of its kind, unprecedented scheme that is going to  
18 have dramatic effects on Metropolitan area, will set a  
19 precedent, as they pointed out, around the country.

20 I think that, you know, when you are doing that kind of  
21 analysis, it is a distinction without a difference to say one  
22 was a construction project or involved some element of  
23 construction, as well as tolling -- that this major tolling  
24 project is not in the same category. And of course,  
25 your Honor, in New York City we have seen the ample

1 construction to create a corridor all the way around 60th  
2 Street all the way to the Battery, each side, West Side  
3 Highway, FDR Drive of gantries, a lot of construction. They  
4 went ahead and did all of that. It is not a no-construction  
5 project. It's cost many, many millions of dollars to do that.  
6 This is not a no-construction project and we have comparable  
7 examples that involve less, less of an impact and they require  
8 an EIS like the JFK access lane.

9 Now, your Honor, let's go back to air quality and  
10 Environmental Justice Communities.

11 Your Honor, I going to hand up the slides I am going to  
12 be using.

13 Now, your Honor, you were told that the reason there  
14 were only two New Jersey counties chosen for the air quality  
15 study, as opposed to ten New York counties, was because Bergen  
16 was highest, Hudson was lowest. And what was in between was in  
17 between, inconsequential.

18 Now, your Honor, the reason why that's arbitrary is  
19 because they did that for New Jersey to minimize what they  
20 looked at in New Jersey, but in New York, they didn't pick --  
21 pick the highest and the lowest. In New York, they picked ten,  
22 even though the percentages on many of the counties are similar  
23 to the fraction of a percent that many of these New Jersey  
24 counties were. But, your Honor, I'm going to point out to you  
25 a couple of anomalies here. All right. Look at Middlesex

1 County, which wasn't studied at all in air quality or  
2 environmental justice. Nearly 15 million more mile -- vehicle  
3 miles traveled by 2045. Not studied at all and had, you know,  
4 more than a third of a percent increase --

5 THE COURT: So --

6 MR. MASTRO: -- in vehicles.

7 THE COURT: So, Mr. Mastro, if the study had been done  
8 the same way in New York, just the high and the low --

9 MR. MASTRO: Yes.

10 THE COURT: -- would you still be here arguing  
11 arbitrariness?

12 MR. MASTRO: I -- I wouldn't because it would be  
13 consistent. But they didn't do that. That is --

14 THE COURT: That's --

15 MR. MASTRO: -- why it is arbitrary.

16 THE COURT: I am just probing the metes and bounds of  
17 your argument, Mr. Mastro.

18 MR. MASTRO: Well, your Honor, the meets and bounds  
19 are clear. She represented to you the incredible logic, but  
20 it's arbitrary to do one thing for New Jersey and give them the  
21 short end of the stick in the review, and do something very  
22 different in New York. That's the arbitrariness. That is the  
23 unreasonableness of it.

24 Now, if we could please go to the next slide.

25 She also told you that -- and, again, these are

1 arguments being made by the MTA even though this is an FHWA  
2 project. So the MTA seems to be back-ending the rationale for  
3 things that the FHWA didn't necessarily explain in its own  
4 documents or didn't explain here.

5 THE COURT: So are you saying to me that that's a  
6 problem because a rationale is being offered by someone other  
7 than the agency in its published decision?

8 MR. MASTRO: Post-hoc rationalizations, your Honor --

9 THE COURT: Exemplarily. Correct?

10 MR. MASTRO: -- especially by the project.

11 THE COURT: Yes.

12 MR. MASTRO: Yes, that's an issue that you have to  
13 look at every time these -- these post-hoc justifications are  
14 made.

15 THE COURT: No, I know what I am supposed to look at.  
16 Are you arguing that that's the case here with the MTA's --

17 MR. MASTRO: I am.

18 THE COURT: -- position?

19 MR. MASTRO: I am. And if I can close the circle,  
20 please.

21 She -- she also said to you --

22 THE COURT: She has a name, Mr. Mastro.

23 MR. MASTRO: Ms. Knauer -- Ms. Knauer also said the  
24 choice and Mr. Cumming said it, too, the choice of the counties  
25 for the environmental justice review was the counties closest

1 to the central business district.

2 Well, your Honor, we -- we know New Jersey counties.  
3 Nassau is out here. Passaic comes closer. Middlesex, which we  
4 just looked at, comes right up to the border. And they're  
5 actual large swaths of Passaic and Middlesex. Middlesex, which  
6 has the second-highest increase in volume of traffic, has more  
7 than 50 percent more commuters going into the central business  
8 district than Union. It comes right up to here. They didn't  
9 consider Middlesex.

10 That's a rationale that isn't rational because there are  
11 additional New Jersey counties that are even closer to the  
12 central business district than some in New York that were  
13 considered and that have, in fact, higher indicia of additional  
14 vehicle miles that will occur by 2045, and more commuters into  
15 the central business district, Middlesex County. Irrational,  
16 makes no sense not to have studied it.

17 Now, your Honor, coming up next we're going to talk  
18 about census tracts.

19 Again, Middlesex County has more census tracts.  
20 Meaning, where they are expecting, you know, worse outcomes.  
21 More census tracts for environmental justice purposes. Many  
22 more than Essex County and almost triple the number in Union  
23 County, ones that were studied. Totally irrational not to  
24 consider Middlesex County and the Environmental Justice  
25 Communities there that might have -- should have qualified for

1 mitigation because they fit in all the categories.

2 Now, next, your Honor, the explanation that you were  
3 given, amplified today by Ms. Knauer, this is what the  
4 environmental assessment actually says, and that's DOT\_0007319  
5 to 20 in the administrative record. It actually says that  
6 all 15 of these communities in New Jersey, in those three  
7 counties, didn't even look at Middlesex, but in those three  
8 counties they have pre-existing pollutants or chronic disease  
9 burdens above the 90th percentile and increased traffic levels  
10 of -- over the period of the study. They all may need  
11 mitigation. Okay.

12 Now sands have shifted, Ms. Knauer tells you what it  
13 really means at the end of the day to narrow that list. At the  
14 end of the day they went with the 90th percentile in pollutants  
15 and 90th percentile in chronic disease.

16 Next slide, please.

17 THE COURT: No, hold on one second. It is a question  
18 I should have asked yesterday. On the left side, where you  
19 have the number of tracts --

20 MR. MASTRO: Yes.

21 THE COURT: -- in some instances you have zeros, and  
22 in other instances there are blanks which I assume mean zeros,  
23 but I want to make sure that that is the case and that there is  
24 not some unintended nuance that I am missing.

25 MR. MASTRO: Your Honor, this is out of the

1 administrative record directly.

2 As you can see, DOT\_731 --

3 THE COURT: I just want to make sure you and I are  
4 understanding the --

5 MR. MASTRO: I --

6 THE COURT: -- reading of the document the exact same  
7 way.

8 MR. MASTRO: I am reading those blanks as zeros, your  
9 Honor. That's what --

10 THE COURT: Okay.

11 MR. MASTRO: And I am once again wondering why Bayonne  
12 has four environmental justice census tracts that didn't get  
13 any further consideration, but leaving that aside --

14 THE COURT: Note, Mr. Cumming, just clarify for the  
15 record that your understanding is exactly the same when you get  
16 up, please; that the blanks mean zero. If not, explain. Go  
17 ahead.

18 MR. MASTRO: Okay.

19 THE COURT: Yes, Bayonne has four identified tracts.

20 MR. MASTRO: Again, the irrationality of that. They  
21 don't make the list. But -- and there's no explanation anyone  
22 has given here why not when it has more than many of the other  
23 communities on this list, including three of the four that are  
24 on the next list.

25 THE COURT: Well, hold on. No explanation given here,



1 here meaning in the record, as opposed to --

2 MR. MASTRO: Correct.

3 THE COURT: -- you're standing up and talking to the  
4 Judge --

5 MR. MASTRO: Correct, your Honor. Correct.

6 Next, please. So now this is the same list. They may  
7 need mitigation, okay, but now we're down to four. And Ms.  
8 Knauer's explanation, not offered by the FHWA, because the  
9 documents in the administrative record go back and forth  
10 between and/or or. But she says that that means and. You have  
11 to have both over the 90th percentile in pollution and over the  
12 90th percentile in chronic disease. So we're now down to four  
13 in New Jersey, even though all 15 may need mitigation. But  
14 even then the environmental assessment and FONSI simply say  
15 that those four could merit place-based mitigation.

16 Here's the rub. Here's the rub. Where does it say in  
17 any regs, where does it say anywhere that when you have found  
18 that a community may need mitigation, that you can then keep  
19 making further distinctions and say, I'm going to take them off  
20 the list because these ones may need mitigation because there  
21 is going to be significant impacts there.

22 But I'm not going to give to those other 11. I'm going  
23 to make distinctions to narrow the list more so I have to do  
24 less mitigation and less places to mitigate. And I don't have  
25 to address the significant impacts in those communities.

1 Because they have environmental justice tracts.

2 They have at least either pollution levels above the  
3 90th percentile or chronic disease above the 90th percentile,  
4 and increased truck traffic to boot. But I'm going, to make  
5 arbitrary decisions so I have to spend less. I am only going  
6 to spend a certain amount of money. So I'm going to make  
7 further moving of the needle to narrow the list so I don't have  
8 to cover those communities. Even though I found -- FHWA  
9 found --

10 THE COURT: One minute, Mr. Mastro.

11 MR. MASTRO: They need mitigation.

12 Yes. This is so critically important, though, your  
13 Honor.

14 THE COURT: Mr. Mastro.

15 MR. MASTRO: Yes.

16 THE COURT: Right. What's fair for one is fair for  
17 the other.

18 MR. MASTRO: Absolutely, your Honor.

19 THE COURT: You asked for ten, you are getting ten.  
20 You got one minute.

21 MR. MASTRO: Thank you, your Honor.

22 So the point being that it's arbitrary. It's  
23 irrational. It's unreasonable and it violates NEPA. The  
24 obligation under NEPA is to mitigate everywhere you found that  
25 may have significant adverse environmental impacts.

1           You can't issue a FONSI unless you have mitigated there.  
2           They continue to make distinctions to narrow a list  
3 because they want it to only have it apply to a small pot of  
4 money in a multi-billion dollar project. It's irrational,  
5 unfair, unreasonable, and it is not consistent with NEPA. You  
6 found --

7           THE COURT: That is a good stopping point, Mr. Mastro.  
8 You've run your ten.

9           MR. MASTRO: Okay.

10          THE COURT: Let's explore a couple of things that you  
11 said. I may not repeat it back exactly correct. Then you are  
12 more than welcome to clarify so I have a clear understanding.

13          So one of the things that you said a couple of moments  
14 ago was, nowhere does it say that additional gradations can  
15 occur. Correct?

16          Do you need me to repeat? Because --

17          MR. MASTRO: No --

18          THE COURT: -- Ms. Myers was whispering in your ear.

19          MR. MASTRO: And she was and you said nowhere does it  
20 say additional gradations.

21          THE COURT: Correct. And is that what you said?

22          MR. MASTRO: I -- I want to make sure --

23          THE COURT: Or you said distinctions. Right? In  
24 other words, once they make the first cut, it can't make  
25 further cuts. Right? The "and" versus the "or."

1 MR. MASTRO: Correct. Once they've decided that it  
2 may need mitigation, they can't then decide oh, I'm going to  
3 put further --

4 THE COURT: You answered my question.

5 MR. MASTRO: Yes, your Honor.

6 THE COURT: You answered my question.

7 MR. MASTRO: Yes, your Honor.

8 THE COURT: So now the next part of this is, is there  
9 an affirmative prohibition in the statute or the regs that  
10 comports with your statement? Or is it your interpretation of  
11 what the statute or the regs say?

12 MR. MASTRO: Your Honor, we have --

13 THE COURT: So let me phrase it differently.

14 What I think you are saying is there is no discretion on  
15 the part of the agency to, once they identify that a community  
16 or a tract needs mitigation, further differentiate.

17 MR. MASTRO: That is -- that is what I believe the  
18 regs require and --

19 THE COURT: Well, so I'm going to ask you.

20 Show me the money.

21 MR. MASTRO: Okay. Your Honor --

22 THE COURT: Show me the reg that that supports your  
23 proposition.

24 MR. MASTRO: Your Honor, I'm going to pull it up right  
25 now.

1 THE COURT: I appreciate your passion and I appreciate  
2 your position, but you made a broad statement.

3 MR. MASTRO: Your Honor --

4 THE COURT: And if you want me to follow the path to  
5 give you the outcome that you want, you have to show me what  
6 supports --

7 MR. MASTRO: Of course, Your Honor.

8 THE COURT: -- your proposition.

9 MR. MASTRO: Of course, Your Honor. And please put up  
10 on the slide for me FHWA's brief.

11 THE COURT: You know what?

12 MR. MASTRO: What?

13 THE COURT: I don't need a whole lot of explanation.  
14 Just identify the reg or the section in the regs that supports  
15 your proposition. It is real easy. Give me a citation. You  
16 don't have to do show and tell with me.

17 MR. MASTRO: Your Honor, 40 CFR, Section 1501.6(c) as  
18 well as 40 CFR, Section 1501.3(a)3.

19 THE COURT: Sorry. 1501.3(a)3.

20 MR. MASTRO: 40 CFR, Section 1501.6(c).

21 THE COURT: Got that.

22 MR. MASTRO: Quote, The FONSI, quote, Shall state the  
23 authority for any mitigation and, quote, Any applicable  
24 monitoring or enforcement provisions if the agency finds no  
25 significant impacts based on mitigation, the mitigated FONSI

1 shall state any enforceable mitigation requirements or  
2 commitments that will be undertaken to avoid significant  
3 impacts.

4 Case law, *O'Reilly v. U.S. Army Corps of Engineers*, 477  
5 F. 3d 225, Page 234, Fifth Circuit, 2007, held, An EA, quote,  
6 Fails to sufficiently demonstrate that the mitigation measures  
7 adequately address and remediate the adverse impacts where it  
8 listed the potentially significant adverse impacts and provided  
9 only cursory detail as to what those measures are and how they  
10 serve to reduce those impacts to a less than significant level.

11 Your Honor, when I --

12 THE COURT: That -- so tell me where those words say  
13 that there is no authority to do additional gradations, right.  
14 I heard what those things said, right. Where does it prohibit  
15 the FHWA from making further gradations?

16 MR. MASTRO: Your Honor -- and, again, also the  
17 *Bordentown* case in the Third Circuit, that the mitigation  
18 measures as a mechanism to reduce environment impact levels  
19 below level of significance, they have to be spelled out and  
20 supported in the record.

21 Your Honor, once you have identified that there may be  
22 significant impacts, and they said as to all 15 that they may  
23 need mitigation, in order to issue a FONSI, an EA, they have  
24 to, to pose mitigation for all 15. They can't define certain  
25 --

1           THE COURT: So, Mr. Mastro, I get it. But we have  
2 shifting sands here.

3           First you are telling me there, in essence, no authority  
4 for the agency to do what you have described as the "and."  
5 Right?

6           I am asking you for regulatory support on that position.  
7 You have given me what you think supports that position. You  
8 have now gone on to case law. And you kind of wrap it up by  
9 saying to me, they didn't explain.

10          But those are two completely different things. Either  
11 they have the authority to do what they did or they didn't.  
12 That is a straight legal argument. Right? The fact that they  
13 may not -- inherent in the -- in they didn't support that  
14 decision is that the agency had the authority to do so. But  
15 they didn't provide, a reasoned explanation for why they did  
16 what they did.

17          I have a real simple question for you.

18          Which is it? Are you saying to me they don't have the  
19 authority to do what they did? Or are you saying they had the  
20 authority to do what they did, and they just didn't explain it  
21 reasonably? That's what I am trying to get at.

22          You don't seem to be answering either of those --

23               MR. MASTRO: I --

24               THE COURT: -- questions directly.

25               MR. MASTRO: I am answering it directly and firmly.

1           They did not have the authority. After finding that  
2 those 15 communities in New Jersey may need mitigation, they  
3 did not have the authority to redefine the scope of what  
4 mitigation they were going to provide.

5           The finding is firm. The FHWA in its own papers, reply  
6 brief Page 15, used the "or" standard and said if it had  
7 pollutants above 90 percent or chronic disease, please take a  
8 look. They quoted from their own environmental assessment and  
9 said that was the standard to be applied.

10           In applying that standard, 15 New Jersey communities  
11 required mitigation, if we're going to have mitigation of  
12 significant impacts. And they arbitrarily then said, no, I'm  
13 going to add another layer to it after I've found that they  
14 already may need mitigation.

15           Clear finding. And they put that and they said, oh, we  
16 are going to define it down --

17           THE COURT: So you're saying to the Court that the  
18 standard is the "or" standard, and that they departed from that  
19 standard to do an "and." And in so doing, did not adequately  
20 explain why they did it?

21           MR. MASTRO: Correct, your Honor.

22           Having found that it -- there was --

23           THE COURT: Well, we took ten minutes to get to there.  
24 So I now clearly understand what you are arguing, and I  
25 appreciate that.



1 MR. MASTRO: Well, I appreciate it. I am sorry if  
2 I --

3 THE COURT: Thank you.

4 MR. MASTRO: -- wasn't clear. I -- it's --

5 THE COURT: Well, you seem to be arguing with me about  
6 the premise behind my questions. We finally got to where we  
7 needed to go. And I appreciate it.

8 So now we understand what you are actually arguing.

9 MR. MASTRO: I -- I am sorry that it -- if it came  
10 across as if we were arguing about the premise of your  
11 question.

12 I agreed with the premise of your question. Having  
13 found that it may need mitigation, they had no rights to then  
14 do a redefinition to try and narrow the field.

15 THE COURT: I got it, Mr. Mastro.

16 MR. MASTRO: Thank you.

17 THE COURT: We're done.

18 MR. MASTRO: Thank you.

19 THE COURT: Okay. Mr. Cumming, you are up for ten  
20 minutes.

21 Just hold on 30 seconds, Mr. Cumming.

22 Mr. Cumming, you are on the clock.

23 MR. CUMMING: Thank you, Your Honor.

24 I'd just like to reiterate at the beginning, that  
25 methodology, whether it's air quality or environmental justice,

1 is an area of need where Courts are most deferential to the  
2 agency's decision-making. That's been reiterated by the  
3 Third Circuit as recently as two months ago as well as courts  
4 around the country. That is the framework through which the  
5 Court has to assess plaintiff's arguments, which are, at base,  
6 second-guessing the agency's methodology.

7 Your Honor asked yesterday about whether there are other  
8 cases that used a similar range of scenarios. And the answer  
9 is, yes, there is an instructive case from District of Columbia  
10 District Court, *Sierra Club V Watkins*, 808 F Supp. 852, that  
11 discusses how the Department of Energy assessed the  
12 environmental -- projected environmental effects of importing  
13 spent fuel rods through ports on the East Coast.

14 THE COURT: 808 F Supp. 852 puts us back in the 1980s?

15 MR. CUMMING: 1991, Your Honor.

16 THE COURT: '80s? '90s? Okay.

17 MR. CUMMING: But Judge Lamberth's decision, I think,  
18 and rationale remains true today, which is that plaintiff's  
19 challenge -- and the Department of Energy used a model that did  
20 not have a spike -- site-specific analysis, essentially, that  
21 assessed a range of potential outcomes in different port  
22 characteristics.

23 And there the Court found that that methodology was  
24 acceptable because it conservatively estimated the risk by  
25 choosing the worst-case variable in each category. That's what

1 the final EA did here. It was a conservative document that  
2 looked at the -- the worst-case scenario in each basket of  
3 facts.

4 Mr. Mastro also discussed how -- yesterday the  
5 pre-existing national ambient air quality violations in the  
6 region. The fact that there are pre-existing violations is  
7 irrelevant to the NEPA analysis.

8 THE COURT: Is irrelevant?

9 MR. CUMMING: Irrelevant into looking at the effects.  
10 And this from the Seventh Circuit, *Highway J Citizens Group v.*  
11 *Mineta*, 349 F. 3d 938 at 954, Note 3.

12 There the agency looked at a construction project over a  
13 river that had pre-existing pollutants. Plaintiffs challenged  
14 the fact that the NEPA project wouldn't clean up those  
15 pollutants, and the Seventh Circuit found that was not  
16 necessary.

17 What the project had to do was assess whether it would  
18 make the pollutant burden worse, but it didn't have to clean up  
19 pre-existing burdens in the area. NEPA takes the status quo  
20 and looks forward. It is not retroactive.

21 THE COURT: Mr. Cumming, that prospective look, as  
22 opposed to retroactive look, is spelled out in language in the  
23 statute or the legislative history and endorsed by the Courts?

24 MR. CUMMING: Both, statute and endorsed by the  
25 Courts.

1 THE COURT: Okay.

2 MR. CUMMING: Language of NEPA requires the analysis  
3 of the effects of the proposed action. Not all effects in the  
4 area.

5 THE COURT: You may not have that statutory language  
6 at your fingertips, but it would be helpful to direct the Court  
7 to where that language exists in the statute.

8 MR. CUMMING: Will do, your Honor.

9 THE COURT: Okay.

10 MR. CUMMING: Mr. Mastro referred to the EPA comments  
11 on this -- Mr. Mastro referred to the EPA's comments. The  
12 Third Circuit has said the agency's responsibility is to  
13 consider them and take them seriously.

14 There is no doubt Federal Highways did that here.  
15 That's what the Third Circuit has said is required. It does  
16 not have to adopt the comments wholesale, although Federal  
17 Highways made substantial changes to the document based on EPA  
18 concerns, but they certainly met the standards set out by the  
19 Third Circuit.

20 THE COURT: Which is no different than how any other  
21 agency is supposed to behave under administrative law, correct?

22 MR. CUMMING: Correct. The point the Third Circuit  
23 was making is that setting aside the EPA's expertise in air  
24 quality does not elevate the agency to a role of a super veto  
25 over the project. Federal Highways was the lead agency, it had

1 to take their comments seriously. It did so here.

2 THE COURT: But in the end, it is treated like any  
3 other citizen would be treated or entity that's offering  
4 comments?

5 MR. CUMMING: Correct.

6 THE COURT: And the agency can choose to give it,  
7 because of the EPA's expertise, appropriate weight?

8 MR. CUMMING: The weight that comments are due.

9 THE COURT: It deserves?

10 MR. CUMMING: Yes.

11 THE COURT: Yes.

12 MR. CUMMING: Correct.

13 Mr. Mastro made points about the methodology for getting  
14 to the environmental justice mitigation analysis. As I touched  
15 on yesterday, that was done using the Council on Environmental  
16 Quality's climate and economic justice screening tool, which  
17 sets out the percentiles at which you can screen communities  
18 for significant effects. That --

19 THE COURT: I'm sorry. Whose screening tool?

20 MR. CUMMING: Council on Environmental Quality's  
21 screening tool.

22 THE COURT: Okay.

23 MR. CUMMING: And that's -- and that was --

24 THE COURT: Which is different than the EPA's  
25 EJ screening tool, correct?

1 MR. CUMMING: Yes, it is, your Honor.

2 THE COURT: Okay.

3 MR. CUMMING: Yes, it is. I believe the CEQ tool is  
4 more recent in response --

5 (Reporter clarification.)

6 MR. CUMMING: -- the CEQ tool is more recent in  
7 response to executive orders. And that is set out at 36993 of  
8 the record.

9 Last point, Your Honor. Plaintiffs conflate air quality  
10 and environmental justice with some frequency. They were  
11 different analyses intended to serve different purposes.

12 And as the EA explains, the Environmental Justice  
13 Analysis required a level of granularity different from air  
14 quality because in many communities there were increases and  
15 decreases in traffic in the same community. Thus, requiring an  
16 analysis at the census tract level, rather than the overall air  
17 quality analysis.

18 THE COURT: Anything else, Mr. Cumming?

19 MR. CUMMING: I have nothing further, your Honor.

20 THE COURT: Okay. One question and it is not on any  
21 of the things that you have discussed in your rebuttal. I want  
22 to talk about local intersections. All right?

23 So the plaintiff emphasizes that the FHWA only analyzed  
24 four traffic intersections in New Jersey out of 102 total, and  
25 contends that the FHWA's failure to conduct an additional

1 hotspot analysis -- I am sorry, additional hotspot analyses,  
2 plural, right, was unreasonable.

3         The government's primary response on the merits provides  
4 that the final EA repeatedly explained local intersections west  
5 of the GW Bridge were not included because traffic at those  
6 intersections connects primarily to regional highways. Because  
7 traffic at individual intersections would be disbursed,  
8 intersection analysis would not have shown the worst case  
9 potential impacts in Bergen County.

10         The EA, instead, used a highway link analysis to  
11 evaluate the area west of the GW Bridge, which was the link  
12 predicted to have the highest potential overall annual daily  
13 traffic from among all links for all scenarios in the study  
14 area. This analysis, along with modeling conducted for two  
15 other highway link hotspots, demonstrated that the project  
16 would not result in exceedances of applicable NAAQS.

17         Is that a correct recitation?

18         MR. CUMMING: It is, your Honor.

19         THE COURT: Okay. The plaintiff, however, maintains  
20 that the highway link analysis was woefully inadequate as  
21 compared to the hotspot analysis, as it is limited to a review  
22 of predicted particulate matter, contains no analysis of carbon  
23 monoxide levels, volatile organic compounds, nitrogen oxides or  
24 sulfur dioxide, all of which are pollutants admitted by  
25 vehicles that harm human health.

1           Is that a correct, to the best of your recollection,  
2           recitation of what plaintiff argued in response?

3           MR. CUMMING: Yes.

4           THE COURT: Why should the Court conclude that highway  
5           link analysis is a reasonable substitute or proxy for a hotspot  
6           analysis given these distinctions?

7           MR. CUMMING: I am glad you asked, your Honor, and I  
8           have three citations to give you on that point.

9           First, your Honor asked about why we are concerned about  
10          particulate matter with respect to diesel truck traffic.

11          The record at DOT\_1164 provides some background on that  
12          point. It is fairly complex, and I don't know that I can -- I  
13          will refer the Court to it rather than --

14          THE COURT: That's fine. Tell the Court what to look  
15          at, and I will be happy to do so.

16          MR. CUMMING: That describes the scientific basis for  
17          what I was saying in layman's terms yesterday.

18          Two other citations, so the highway link analysis was  
19          approved by the ICG Group, which is the air quality  
20          consultation group in conformance with the EPA guidance. There  
21          are two record cites -- DOT\_36864, referring to document  
22          starting at DOT\_36818 and DOT\_6854, referring to document  
23          starting at DOT\_6805 -- that indicate the approval of the  
24          highway link analysis by that group and its conformity with  
25          standard EPA modeling techniques. Your Honor asked why should



1 it find it reasonable, that's why.

2 THE COURT: Thank you.

3 MR. CUMMING: Thank you, your Honor.

4 THE COURT: I appreciate it.

5 Ms. Knauer, I assume you are up in rebuttal.

6 MS. KNAUER: Yes, your Honor.

7 THE COURT: You are on the clock, Ms. Knauer.

8 Ten minutes.

9 MS. KNAUER: Thank you, your Honor.

10 I think that the prevailing theme of New Jersey's  
11 presentation is that this project requires an EIS because  
12 New Jersey says it requires an EIS because it is a new kind of  
13 project.

14 That's not what NEPA looks at. NEPA looks at the  
15 effects of the project and that's what the EA did and  
16 determined that with mitigation, they were not significant.

17 So this is not a know-it -- "I know it when I see it"  
18 standard. It is an administrative law standard.

19 THE COURT: You are saying to the Court that your  
20 belief is that the general theme running through plaintiff's  
21 presentation, plaintiff's affirmative case is it is because I  
22 say it is.

23 MS. KNAUER: And because it is a big project and  
24 affects, you know, a highly populated area, which, I mean, a  
25 lot of analysis was done for that very reason.

1           I think there was a colloquy between your Honor and  
2 Mr. Mastro about the other highway projects that they were  
3 comparing this one to, and you noted that those projects were  
4 construction projects and Mr. Mastro said there is some  
5 construction associated with this project. That's true, there  
6 is. The effects of that were studied in the EA. New Jersey  
7 has not contested --

8           THE COURT: But the construction --

9           MS. KNAUER: It is minor.

10          THE COURT: Well, it is not infrastructure -- well,  
11 I'll actually, phrase --

12          MS. KNAUER: It is not highway widening.

13          THE COURT: -- it differently.

14          MS. KNAUER: It is not highway widening.

15          THE COURT: It is not infrastructure construction like  
16 the other four projects were infrastructure construction.

17          MS. KNAUER: Precisely. It is, basically, adding  
18 sensors and, in some case, some lamp posts.

19          THE COURT: You mean when I look out my window from my  
20 courthouse in New York and I see an extra rectangular box on  
21 a --

22          MS. KNAUER: Correct.

23          THE COURT: -- traffic stanchion.

24          MS. KNAUER: And that was all studied in the -- it was  
25 all studied, you know, in the EA. None of it is occurring in

1 New Jersey, and New Jersey didn't complain about it in their --  
2 in this case. So I think to bring it up now is beside the  
3 point.

4 THE COURT: Well, maybe not.

5 MS. KNAUER: In terms of the air quality study area, I  
6 think we have presented on the basis for choosing those two  
7 counties. That's in the record. That was not something that  
8 New Jersey opposed in its early comments or its draft EA  
9 comments or in its comments on -- I don't believe it looked --  
10 it talked about that in its comments even on the final EA, but  
11 Middlesex County, I think Mr. --

12 THE COURT: Let's hold on ten seconds, Ms. Knauer.

13 When was the point in time in the process where the two  
14 counties were identified from the larger list? At the time of  
15 the draft EA?

16 MS. KNAUER: Correct.

17 THE COURT: It was identified, in your view, in  
18 sufficient time that if anybody objected to the reduction in  
19 the number of counties, it was presented with sufficient notice  
20 that if somebody wanted to comment, that it should be.  
21 Otherwise, it could have been done.

22 MS. KNAUER: Absolutely. I mean, the air quality  
23 analysis presented in the draft EA, New Jersey didn't comment  
24 on any aspect of it.

25 THE COURT: But this is not a circumstance where

1 something changed from the draft EA to the final EA?

2 MS. KNAUER: That's correct, your Honor.

3 In terms of Middlesex County, I think Mr. Mastro  
4 suggested that the project would cause a  
5 15 million-vehicle-miles-traveled increase in Middlesex County.  
6 He was citing to the no-action condition in Middlesex County,  
7 not to increases from the project. I just wanted to put that  
8 on the record.

9 In terms of the highway link analysis, Mr. Mastro  
10 presented the -- I think we have this. I might not have -- I  
11 think I gave it to you yesterday, your Honor. There was a page  
12 that showed and it was -- it's similar to what Mr. Mastro  
13 presented on the screen, which was a list of the links and the  
14 scenarios, and the I-95 link, scenario C coming up as the worst  
15 for overall average daily traffic.

16 THE COURT: I-95 link in the Metropolitan New York  
17 area leading to the CBD?

18 MS. KNAUER: Leading to -- well --

19 THE COURT: Leading to Manhattan.

20 MS. KNAUER: -- leading to the George Washington  
21 Bridge --

22 THE COURT: Leading to the George Washington Bridge.

23 MS. KNAUER: -- which doesn't go directly into the  
24 CBD.

25 THE COURT: Right.

1 MS. KNAUER: Mr. Mastro highlighted that scenario A,  
2 according to the list, would have a slightly higher increase in  
3 trucks, but that was not the metric used to choose the I-95  
4 location for the Highway Link Analysis. The metric used for  
5 that was highest overall annual average daily traffic.

6 There was another link chosen --

7 THE COURT: And the pinpoint on that in the record is?

8 MS. KNAUER: The point that -- the chart that  
9 Mr. Mastro pointed to is DOT\_6846, which presents -- it is in  
10 that same --

11 THE COURT: It's in that same chart?

12 MS. KNAUER: The explanation is presented, I think,  
13 right before that chart --

14 THE COURT: Okay.

15 MS. KNAUER: -- within the record.

16 THE COURT: If we have any concerns, we will sort it  
17 out.

18 MS. KNAUER: Mr. Mastro suggested that my presentation  
19 was a post-hoc rationalization of FHWA's decision-making in  
20 terms of the Environmental Justice Analysis, that's absolutely  
21 not true.

22 The -- I was merely pointed to parts of the record which  
23 lays out the basis for FHWA's decision.

24 With respect to --

25 THE COURT: So what you are saying to the Court is

1 your arguments appear in either the final EA or the FONSI, and  
2 so what you were doing was ostensibly parroting that which the  
3 FHWA had already said in writing.

4 MS. KNAUER: Correct. And just highlighting it for  
5 the Court.

6 THE COURT: You are not offering any new rationales in  
7 support that were not found in the record.

8 MS. KNAUER: Correct. And the rational for the  
9 identification of communities is found in the record at  
10 DOT\_7322 through 7328, which is the discussion in appendix 17D,  
11 which is part of the EA, describing how FHWA determined which  
12 communities -- and I will get to why there is a difference  
13 between they warrant mitigation and that were identified for  
14 place-based mitigation. That is all laid out within those  
15 pages of the EA. I was not making a post-hoc rationalization  
16 for them.

17 In terms -- I think that Mr. Mastro's argument that  
18 there were certain communities, the 15 Census Tracts that were  
19 identified as may warranting mitigation and that they were  
20 limited then to seven, that's just not true.

21 He is completely ignoring the regional mitigation  
22 measures, which were identified that would benefit all of those  
23 census tracts, not just the seven.

24 The seven were identified for even greater attention  
25 because they had chronic disease burdens above the

1 90th percentile as well as pollutant burdens.

2 Bayonne --

3 THE COURT: Are you saying to the Court that the  
4 broader number has been identified for mitigation purposes, but  
5 the smaller number has been identified in order to receive  
6 enhanced mitigation because of the presence of both the  
7 pollutants and the chronic disease?

8 MS. KNAUER: Precisely, your Honor, precisely.

9 And that is laid out in the document and the rationale  
10 for that are laid out in the pages that I just cited.

11 Bayonne, in particular, Mr. Mastro raised, that is an  
12 area that has pollutant burdens but does not have the high  
13 chronic disease burdens that some of the other census tracts --

14 THE COURT: So Bayonne would fit into the first  
15 category but not the second category?

16 MS. KNAUER: Correct, but it will benefit from the  
17 regional mitigation, including what I described yesterday, the  
18 clean trucks initiative, the overnight toll discount, and  
19 related measures.

20 So it is not that it is not -- it's not that mitigation  
21 was not identified for those communities, it was. And many  
22 millions of dollars are going to be committed to it. It is  
23 just that those communities were not seen in terms of  
24 pre-existing burdens as specifically warranting localized  
25 mitigation within the communities themselves.

1 I also -- there was a discussion about -- I also just  
2 want to note that the Environmental Justice Analysis, while  
3 part of the EA and NEPA, it is not pursuant to any regulation.  
4 It is, you know, a federal policy pursuant to executive orders.

5 So in terms of the mitigation that was identified there,  
6 it wasn't really to specifically address significant adverse  
7 impacts that were identified through the NEPA analysis, but to  
8 recognize the importance of insuring that our ongoing federal  
9 actions don't continue to adversely -- disproportionately  
10 adversely affect environmental justice communities.

11 THE COURT: So if I understand you correctly, and I  
12 think Mr. Cumming may have said this yesterday as well, NEPA  
13 has a set of requirements. And then while not specifically  
14 spelled out in NEPA, either overlaid or in conjunction with or  
15 concomitant with NEPA is the executive order directive to deal  
16 with environmental justice on top of whatever NEPA is  
17 requiring.

18 MS. KNAUER: Absolutely, your Honor.

19 And the NEPA analysis, the straight air quality analysis  
20 found that the project would not create any new exceedances of  
21 ambient air quality standards. Therefore, no significant  
22 adverse effects.

23 THE COURT: So while theoretically -- interrelated --

24 MS. KNAUER: Yes.

25 THE COURT: -- some of the same considerations that go



1 into the air quality analysis are not necessarily the same  
2 considerations that go into the Environmental Justice Analysis  
3 because the Environmental Justice Analysis is required by  
4 something other than NEPA.

5 MS. KNAUER: Absolutely, your Honor.

6 And it adds on the consideration of pre-existing  
7 burdens. That is the important aspect of environmental justice  
8 that is not --

9 THE COURT: But those pre-existing burdens are not  
10 something spelled out as a requirement in NEPA. They are  
11 spelled out in the executive order directive regarding  
12 environmental justice.

13 MS. KNAUER: They are recognized by the executive  
14 order.

15 THE COURT: Yes.

16 MS. KNAUER: Yes, your Honor.

17 THE COURT: Okay. I have one more question for you,  
18 Ms. Knauer. Then I will let you join your colleagues.

19 The MTA argues that the EA considered seven potential  
20 environmental justice screening tools, including the EPA's EJ  
21 screening tool and the New Jersey environmental justice screen.

22 So my question to you is: EPA has got expertise.  
23 Right? In this area?

24 MS. KNAUER: Correct.

25 THE COURT: Why were the EJ screen tool and New Jersey

1 environmental justice screen tool rejected in favor of  
2 something else?

3 MS. KNAUER: The New Jersey screen tool is for  
4 New Jersey and a large part of the study area is not in  
5 New Jersey.

6 So to use a data set that extended over the entire study  
7 area, it was appropriate to use EPA's tool.

8 THE COURT: But wasn't the EPA tool rejected?

9 MS. KNAUER: Well, no, it was used to -- I mean,  
10 the...

11 THE COURT: I am not so sure I agree with that,  
12 Ms. Knauer.

13 MS. KNAUER: EPA's tool -- EPA's tool -- well, EPA's  
14 tool can be used in different ways, but it was --

15 THE COURT: But -- but -- but I mean, it's -- I get  
16 the distinction about not using the New Jersey tool.

17 MS. KNAUER: Right.

18 THE COURT: I'm assuming that was explained in the EA  
19 as to why the New Jersey tool --

20 MS. KNAUER: The EA -- the EA explains the methodology  
21 that was used to identify Environmental Justice Communities.  
22 It was also explained in the draft EA --

23 THE COURT: Right.

24 MS. KNAUER: -- and was not commented on by New Jersey  
25 at the time of the draft EA.

1           It -- it used the -- the methodologies familiar to --  
2   that -- that come out of the executive order which specifies  
3   minority and low income communities as the communities of  
4   concern for Environmental Justice Analysis.

5           So the methodology is laid out in the EA explaining that  
6   there was a threshold used for minorities which was either 50  
7   percent -- 50 percent of the population within the census tract  
8   or a greater amount than within the county, I believe.

9           THE COURT: All right. Wasn't the main consideration  
10   the consistency across data sets so that there could be an  
11   appropriate analysis or comparison?

12          MS. KNAUER: Correct. Correct.

13          THE COURT: So that is why the New Jersey screening  
14   tool was rejected --

15          MS. KNAUER: Correct.

16          THE COURT: -- because it didn't allow that but the  
17   methodology that was chosen did allow that, including looking  
18   at things like CDC data. Correct?

19          MS. KNAUER: Well, there's two -- there's two parts of  
20   to it. One was identifying the environmental justice census  
21   tracts. That was one thing. And then -- then in order to  
22   identify the highly burdened census tracts, EPA's EJ screen was  
23   used for the pollutant burdens and the CDC tool was used for  
24   the chronic disease burdens because the EJ screen didn't cover  
25   New Jersey.

1 THE COURT: Okay.

2 So the -- the problem with the EPA tool was that it  
3 didn't cover New Jersey?

4 MS. KNAUER: Correct. For identifying chronic disease  
5 burdens, specifically.

6 THE COURT: Do you have any understanding as to why  
7 the EJ tool did not cover New Jersey for determining chronic  
8 disease?

9 MS. KNAUER: I can only speculate that New Jersey  
10 didn't provide their data to the EPA, but I really don't know.  
11 I don't know the answer to that.

12 THE COURT: Maybe Mr. Cumming knows the answer to that  
13 question.

14 Thank you, Ms. Knauer. I appreciate it.

15 MS. KNAUER: Thank you, your Honor.

16 THE COURT: Mr. Cumming, I may have asked Ms. Knauer  
17 some things when I engaged in colloquy with her that perhaps  
18 might be more appropriate for you to answer.

19 I will give you two minutes.

20 MR. CUMMING: Thank you, your Honor.

21 What Ms. Knauer said at the end sounds right to me. I  
22 mean, the Federal Highway used methodology set out in CEQ  
23 guidance documents pursuant to executive order to determine  
24 which were environmental justice communities. It then used  
25 various screening tools to isolate those communities.

1 THE COURT: Okay.

2 MR. CUMMING: And then when -- when it came to  
3 screening those communities for mitigation, used further CEQ --  
4 recent CEQ guidance to see -- the CEJST -- and I may be saying  
5 the acronym wrong. So it is in appendix 17D. It is set out  
6 that the more recent CEQ guidance that was used to screen for  
7 communities for mitigation. I don't know the answer,  
8 your Honor, to the New Jersey data in the EJ screening tool.

9 THE COURT: Okay.

10 MR. CUMMING: I don't know.

11 THE COURT: All right. Thank you.

12 Everybody stay put for a minute.

13 All right. Ms. Knauer, I have a question for you to the  
14 degree that you can comment on this.

15 MS. KNAUER: Yes, your Honor.

16 THE COURT: And that is the CEQ screening tools that  
17 Mr. Cumming just discussed with the Court versus the EPA  
18 screening tool. Do you have any comments that you feel you can  
19 add?

20 MS. KNAUER: Well, I will add one point. I think when  
21 Mr. Cumming is referencing the CEQ tool, it -- it really uses  
22 the same data set, as to my understanding, as the EJ screen and  
23 CDC, but it -- it does identify the 90th percentile for  
24 pollutant burdens and chronic disease burdens as those -- as --  
25 as setting forth the threshold for which community benefits

1 from federal programs should be directed.

2 I will say that in this case, you know, and -- and I  
3 think I mentioned yesterday that the EJ screen tool uses  
4 an 80th percentile for identifying what it, you know, looks as  
5 communities of concern for pollutant burden. And the CDC tool  
6 uses a 66th percentile for, you know, a high -- considering a  
7 high chronic disease burden.

8 You know, in -- in terms of how the analysis played out,  
9 it -- it does discuss the CEJST 90th percentile threshold as --  
10 as a reason for looking at those certain communities for  
11 mitigation. However, you know, within this particular --  
12 which, you know, the -- the FHWA determined was reasonable, but  
13 in this particular study area, it really doesn't make a  
14 difference which percentile and threshold you use. It ends up  
15 being the same census tracts. So it didn't change the number  
16 of census tracts for mitigation at all to use the 90th  
17 percentile versus 80th or 66th.

18 THE COURT: Okay. Thank you.

19 MS. KNAUER: But there -- but there was a rationale  
20 laid out for FHWA for using that, which is the newest federal  
21 guidance under environmental justice.

22 THE COURT: Thank you.

23 MS. KNAUER: Thank you, your Honor.

24 THE COURT: Okay. Mr. Cumming, you talked about  
25 publication.

1 MR. CUMMING: Yes.

2 THE COURT: And you said that the re-eval is going to  
3 be published on the MTA website.

4 MR. CUMMING: Correct, your Honor.

5 THE COURT: Well, I guess I am curious. It's an FHWA  
6 decision. Why is it being published on the MTA website? Is --  
7 I take from your statement, therefore, it is not being  
8 published on the FHWA website.

9 And so my question is what's going on and why?

10 MR. CUMMING: My understanding is Federal Highways  
11 usually has the project sponsor publish the decision documents.  
12 It doesn't make them any less federal documents.

13 I will note here, I think, your Honor, that's to the  
14 public's advantage. The EA documents have been available on  
15 the MTA website. They are widely reported on. Everyone knows  
16 where to find them. This keeps it consistent with the rest of  
17 the documents in this case and the rest of the information  
18 about the project.

19 THE COURT: Okay. Thank you.

20 MR. CUMMING: Thank you.

21 THE COURT: All right, I'm going to give us a very  
22 quick five-minute stretch break. Then I'm going to hear  
23 argument from Amici. And then we will make our adjustments on  
24 the schedule for the rest of the day.

25 (Recess taken 10:49 a.m. to 10:58 a.m.)

1 THE COURT: Be seated, please.

2 Mr. Mateen, you are up first.

3 Mr. Nagel, you are up second.

4 On the defense side, Mr. Reichman --

5 MR. REICHMAN: Yes, your Honor.

6 THE COURT: All right. You will be up first.

7 Who is speaking on behalf of the other defendant amici?

8 MR. OTIS: I am, your Honor. Mr. Otis.

9 THE COURT: Mr. Otis. Okay.

10 I was just handed a document. So who handed me a  
11 document?

12 ATTORNEY FROM MR. MATEEN'S OFFICE: Your Honor, I did,  
13 for Mr. Mateen.

14 THE COURT: Okay. Very good.

15 Mr. Mateen, you may comment on anything that was  
16 discussed yesterday or up until now.

17 MR. MATEEN: Thank you, your Honor.

18 THE COURT: You have ten minutes, you are on the  
19 clock.

20 MR. MATEEN: Thank you, your Honor.

21 First to be clear, the County of Bergen fully supports  
22 and endorses the all of the arguments set forth by the  
23 plaintiff State of New Jersey, both in its moving papers and  
24 the arguments you heard yesterday, today, and the arguments  
25 that you will hear later today.



1           The county's position is clear, the final environmental  
2 assessment and finding of no significant impact was and -- was  
3 not a reasoned decision given the data. And every single  
4 tolling scenario Bergen County will experience increases in  
5 vehicles, miles traveled, average daily traffic, and air  
6 quality.

7           It also -- I don't want to just reiterate points that  
8 you already know. I just want to emphasize that impacts on  
9 Bergen County should have been deemed significant. The  
10 explanation for as to why they were not deemed significant is  
11 missing from the administrative record.

12           And also there is no dispute that the Bronx is entitled  
13 to mitigation. Nothing that we're arguing seems to suggest  
14 that they are not entitled to mitigation, but based on the  
15 data, if not Bergen County, then who? We're going to see far  
16 more increases in -- under each measured category, but there  
17 was zero dollars committed to Bergen County. You asked the  
18 question to both the FHWA and the MTA yesterday as to why there  
19 was not a single dollar amount committed to Bergen County. We  
20 don't have an answer to that question. The -- we just get the  
21 run around that there may or there could be.

22           Ultimately, there still is \$120 million in funding  
23 available for mitigation efforts, but there is no sense or  
24 indication that Bergen County will be receiving any of that  
25 funding, and it is a concern to the nearly 1 million residents

1 in Bergen County, the seven municipalities, and we think that  
2 the findings of the EA are not supported by the data, and we  
3 submit to the Court that you should vacate the final  
4 environmental assessment and the finding of no significant  
5 impact.

6 Thank you, your Honor.

7 THE COURT: Thank you, Mr. Mateen.

8 Mr. Nagel.

9 MR. NAGEL: Per your Honor's prior order, representing  
10 the town of Fort Lee and the class that has asserted claims in  
11 this case.

12 I will focus my argument this morning on the incurable  
13 defect in the FONSI and explain to your Honor that the law of  
14 the Third Circuit requires that this plan not go forward.

15 As a starting point, the FONSI and this record provides  
16 hard findings that have never been disputed and that is any  
17 plan that goes into effect will seriously affect air quality in  
18 six different metrics and will increase traffic and general  
19 pollution for not only Fort Lee and Bergen County but for all  
20 of the affected areas.

21 And with these findings, Judge, the only way to get  
22 around it to move forward with the FONSI, to arrive at the  
23 bottom line of no significant impact is there must be a linkage  
24 of mitigation. You must have mitigation in order to get to the  
25 bottom line.

1           And what I say today is that that has not been done with  
2     respect to Bergen County. That is a fatal flaw that cannot be  
3     cured.

4           I will just quickly remind the Court, and this really  
5     extracts from the excellent presentation Mr. Mastro and his  
6     slides, and, again, we adopt all of the arguments that have  
7     been set forth for the last two days, but in the two counties  
8     that have been receiving or will receive specific dollars and  
9     where there is a plan in place, the metrics are absolutely  
10    unrefutable.

11           Bergen County suffers the worst -- far worst than Bronx,  
12    and the next slide if you could -- if you would, and suffers  
13    far worst than New York counties. And these two counties, on  
14    the face of the FONSI, get \$35 million for Bronx and \$45  
15    million for New York County and additional, specifically  
16    targeted plans that help these two locales.

17           We, meaning Bergen County, my client, mayor of Fort Lee  
18    and other towns in Bergen County, we get zero. We get zero.  
19    And that's been admitted. It has been admitted by the  
20    agencies. We get zero.

21           The logical and impossibility that is presented by this  
22    plan is obvious.

23           Without mitigation -- without mitigation funding and  
24    without mitigation enforceable plans for Bergen County, which  
25    by these charts is far more deserving than any of the New York

1 Counties that got money, there cannot be a supportable finding  
2 of no significant impact. It cannot be. It is a flaw that  
3 cannot be cured. It is a flaw that requires an environmental  
4 impact study to be done. It is a flaw that requires this move  
5 forward to stop and stop now.

6 I would like to focus on the law now. I would like to  
7 put this into perspective because we heard arguments for two  
8 days. We heard arguments. Oh, there is a generalized  
9 statement that you are going to get money. There is a  
10 generalized statement. Oh, these plans may benefit you, but  
11 that doesn't comport with the law, Judge.

12 And as your Honor focused this morning, as Mr. Mastro  
13 aptly pointed out to your Honor, the starting point has got to  
14 be 40 CFR 1501.6. Now, why? Why is that the starting point  
15 for any analysis?

16 The heading of that CFR is findings of no significant  
17 impact. And what's critical about subsection C in that CFR  
18 provision is that not once but on two separate occasions within  
19 that provision there is reference to enforcement provisions.

20 It is critical under the law that any mitigation plan be  
21 laid out in a way that we understand what it is and gives us  
22 the right to enforce it.

23 And the second sentence of that provision specifically  
24 says, If the agency finds no significant impacts based upon  
25 mitigation, which, as I have said, it is undisputed, does not

1 exist for Bergen County.

2 The mitigated findings of no significant impact shall  
3 state any enforceable -- again, I am using that word -- any  
4 enforceable mitigation requirements or commitments that will be  
5 undertaken.

6 THE COURT: Mr. Nagel, you're saying that the  
7 regulation imposes an affirmative duty.

8 MR. NAGEL: Exactly. I'm saying that duty was  
9 breached, and I am saying it cannot be cured.

10 There is no place in that FONSI, no place where there is  
11 ever any plan, any enforceable measure. There is no place  
12 whatsoever. And the CFR provision requires, requires  
13 commitments to be undertaken to avoid significant impact.

14 It does not leave open the question. You cannot read  
15 the plan and understand what it is New Jersey, Bergen County,  
16 Hudson County, Union County, the affected counties, you cannot  
17 read it without understanding there is nothing there.

18 Quite frankly, since I'm a Jersey boy in Jersey State,  
19 you read this plan and you say for Bergen County and  
20 New Jersey, where is the beef? There is nothing there. There  
21 is no beef. There is no roll. There is no pickle. There is  
22 no special sauce. There is nothing -- we don't get anything  
23 and yet, and yet, New York does.

24 So we are far worse by the metrics on the board. We are  
25 far worse than all of the studies on pollutants, on increased

1 traffic, on every metric, and yet we get zero.

2 Now, I've heard for two days from the agency, oh, you  
3 will get it in the future. Oh, you can read the plan. Oh, you  
4 will share in it, but that doesn't comport with the law, Judge.

5 And I haven't heard a peep about the *Bordentown*  
6 Third Circuit case, which gives us the standard when we look at  
7 the viability of a mitigation plan.

8 THE COURT: So illuminate the Court about *Bordentown*,  
9 Mr. Nagel.

10 MR. NAGEL: I will, Judge.

11 That is, as your Honor well knows, the New Jersey  
12 pipeline case that was challenged monitoring wells,  
13 interference with vegetation, et cetera.

14 What's so important about this case is it gives us the  
15 language -- and recent, 2018, it gives us the language that I  
16 believe is critical and dispositive in this case.

17 It tells us that in order for mitigation plan to be  
18 viable, it must detail what the measures are. It doesn't have  
19 to be perfect, but it has to detail what the measures are.

20 Where can we find that in the FONSI? It does not exist.

21 THE COURT: Mr. Nagel, let me ask you this: It has to  
22 detail the measures.

23 Does the *Bordentown* case give us any sense as to what  
24 the considerations are, what the parameters are, what the  
25 factors are, for the Court to consider as to whether something

1 has sufficient detail?

2 MR. NAGEL: Well, the answer to that is -- the answer  
3 to that is yes, with the second half of the statement and  
4 that's as follows: The Court looked to the exact language that  
5 I just hung my hat from of the CFR. The Court, basically  
6 looked to that enforcement language that appears twice in the  
7 CFR.

8 And it says, at page 259, Mitigation measures will be  
9 deemed sufficiently supported where, in quote, There are likely  
10 to be adequately policed -- again, concept of enforcement --  
11 such as where the mitigation members are -- measures are  
12 included as mandatory conditions in a permit.

13 So in this case, they link the enforcement to the  
14 granting of the construction permit. Smart.

15 Where in this FONSI will you find anything that gives us  
16 structure, which gives us an outline, and tells us how we can  
17 enforce it?

18 No. Counsel stands up and says, Oh, we will take care  
19 of it in the future.

20 That does not comport with the law.

21 THE COURT: So you're saying to me that the  
22 defendant's view is too speculative in light of the language in  
23 the *Bordentown* case coupled with the 1501.6 language.

24 MR. NAGEL: That's precisely what I'm saying,  
25 precisely.

1 I would like to hear at some point from my very educated  
2 brethren on this side of the bench --

3 THE COURT: Maybe you would think the Court might like  
4 to hear.

5 MR. NAGEL: This side of the bar, not the bench.

6 I would love to here how much money am I getting in the  
7 future, and how do I test that, and how do I appeal it? Do you  
8 think for one minute, Judge, do you think for one minute with  
9 three New York agencies identified as the sponsor in this case  
10 that they are going to voluntarily share the MTA revenues with  
11 us? And what's the mechanism to get it? How can I enforce  
12 that, which is the legal requirement? Legal requirement says  
13 you need to set mitigation which is enforceable. That's not  
14 here in this case.

15 THE COURT: Anything further, Mr. Nagel?

16 MR. NAGEL: Yes.

17 THE COURT: You have one minute.

18 MR. NAGEL: I will do it in 42 seconds.

19 How, Judge? How can any agency take a hard look at  
20 something that doesn't exist? There is no mitigation plan.  
21 There is no mitigation money. You can't take a hard look at  
22 that. This plan must fail. We have wait ed many, many, many  
23 years, Judge. This has been around. I think it was adopted  
24 over ten years ago. It has been kicking around in the  
25 legislature, been kicking around in political circles. We can



1 wait a little bit longer so that they can comply with the law.

2 Thank you, Judge.

3 THE COURT: Thank you, Mr. Nagel.

4 Mr. Reichman.

5 MR. REICHMAN: Good morning. Thank you for allowing  
6 the 34 New Jersey Amici, who include many of the leading  
7 environmental and transportation groups in the state, to speak  
8 today.

9 Amici strongly support the tolling program and believe  
10 that the governor is not acting in the best interest of  
11 New Jersey and, in particular, New Jersey commuters in suing to  
12 stop the plan.

13 Tolling will benefit the vast majority of New Jersey  
14 commuters more than 75 percent of whom use public  
15 transportation to commute into the CBD. This inconvenient fact  
16 was ignored yesterday by the state in its hours of argument.

17 Approximately, 50 percent of New Jersey commuters,  
18 including drivers, use the MTA once they get into the central  
19 business district and will benefit from the MTA's capital  
20 improvements and being able to breathe cleaner air.

21 And all the leading environmental groups in New Jersey  
22 also support congestion pricing because it is a central  
23 strategy to meet the state's climate goals. One of those goals  
24 is to reduce greenhouse gases by 50 percent by 2030 and a major  
25 source of greenhouse gases in New Jersey are vehicles,

1 almost 40 percent of greenhouse gases in the state, by far and  
2 away the largest source of greenhouse gases.

3 And one of the best, if not the best, available strategy  
4 we have to reduce those greenhouse gases and toxic pollutants  
5 is getting people out of their cars and into trains and buses,  
6 and that's exactly what the tolling program is designed to do.

7 Now, Mr. Mastro at one point argued that the Court needs  
8 to look at the totality of the circumstances in determining  
9 whether to enjoin the program.

10 We agree.

11 When you view the totality of the program, it is crystal  
12 clear that congestion pricing will benefit the entire region,  
13 not just New Jersey, by reducing greenhouse gases and pollution  
14 and traffic congestion, increasing revenue for New Jersey  
15 Transit and making lives of the vast majority of New Jersey  
16 commuters better.

17 Now, the poster child for this is Bayonne. Bayonne came  
18 up repeatedly during the presentations today. Well, Bayonne,  
19 you only have to look at a map, your Honor, to understand why  
20 Bayonne would benefit so much from congestion pricing.

21 Bayonne is located on the turnpike expansion that runs  
22 from Newark through Bayonne, through Jersey City into the  
23 Holland Tunnel. Congestion pricing is going to divert traffic  
24 away from Bayonne, and that's why when the government went and  
25 made its excellent -- or Federal Highways made their excellent

1 presentation yesterday, they showed how things like particulate  
2 matter would be so much lower in all of Hudson County as a  
3 result of congestion pricing.

4 And, really, your Honor, what New Jersey's argument  
5 boils down to is that they want you to scrap a plan that's been  
6 in -- decades in the making and that will hugely benefit the  
7 entire region because there are a few census tracts in  
8 Bergen County where truck traffic would be worse and a specific  
9 dollar figure has not yet been pledged in mitigation.

10 Your Honor, accepting that argument would turn the  
11 intent and purpose of NEPA on its head, and to use your Honor's  
12 grading analogy, all that does is turn an A paper to an A-minus  
13 paper.

14 In the limited time I have available, I want to focus on  
15 the State's breathtaking cynicism and hypocrisy when it comes  
16 to arguing that all highway projects require an EIS and not a  
17 FONSI.

18 While the plaintiff argues that it is FHWA that's not  
19 acting consistently with past practice, it is New Jersey, which  
20 is taking the position that are completely contrary to the  
21 ones that they are taking here with respect to a project that's  
22 been referred to earlier, that's located less than five miles  
23 away from here.

24 The Turnpike Authority, the state agency, is planning to  
25 spend \$10.7 billion --

1 (Reporter Clarification.)

2 -- billion with a B, to expand the Turnpike 8.1 mile  
3 section, again, that I noted runs from Newark through Bayonne  
4 through Jersey City to the Holland Tunnel.

5 It is going to spend more than \$6 million alone to  
6 replace the Newark Bay Bridge. Tear it down and build two new  
7 bridges in the place, doubling the capacity of that bridge.

8 And despite the massive amount of money being spent, how  
9 this project will change traffic patterns for generations. And  
10 by its own statements --

11 THE COURT: Mr. Reichman, which project? The MTA  
12 tolling scheme or the billions of dollars to reconstruct the  
13 Newark Bay extension of the Turnpike?

14 You said, This project, and you had mentioned two  
15 projects.

16 MR. REICHMAN: I'm sorry.

17 THE COURT: I'm trying to follow your argument, and I  
18 am trying to figure the reference back.

19 MR. REICHMAN: Yes.

20 THE COURT: So you have to help me out here.

21 MR. REICHMAN: Yes. I'm -- I am talking about the  
22 Turnpike expansion project.

23 THE COURT: Okay.

24 MR. REICHMAN: That is 10.7 billion total.

25 THE COURT: Right. And the Newark Bay Bridge. Right?

1 MR. REICHMAN: That's right. More than \$6 billion.

2 THE COURT: Right.

3 MR. REICHMAN: Now, that's a project, your Honor, that  
4 will -- will change traffic patterns for generations. It is  
5 going to, obviously, increase traffic. The state has admitted  
6 as much.

7 Yet, what the -- what the state's position there is,  
8 that there -- they only need to do a FONSI. They don't need to  
9 do an environmental impact statement, directly contradictory.  
10 The very arguments that the state is making here.

11 Now, when MTA's counsel raised this morning the fact  
12 that the position they are taking with respect to environmental  
13 justice on that project is different from the position they are  
14 taking here, Mr. Mastro stood up and said, ah, no, no, no,  
15 don't consider that, that's -- that's not a federal project.  
16 Well, that statement is demonstrably false.

17 The project includes the replacement of the bridge,  
18 which requires a Coast Guard permit, which is why the Turnpike  
19 Authority submitted to a -- what -- a draft EA in which they  
20 specifically argued there is no need for an environmental  
21 impact statement on a \$10.7 billion highway expansion project.

22 So -- and I think probably the most cynical and  
23 disingenuous part of New Jersey's summary judgment motion is it  
24 is linking the tolling program to the destructive highway  
25 practices of Robert Moses, such as his building the Cross Bronx

1 Expressway through the East Tremont area. The tolling program  
2 is the antithesis of the Moses approach. It discourages  
3 driving and incentivizes public transportation.

4 In contrast, it is New Jersey that's emulating Moses's  
5 legacy when it is seeking to spend \$10.7 billion to expand a  
6 highway through one of the most densely populated parts of the  
7 state.

8 Your Honor, I am running out of time, but I would say,  
9 too, that this -- in the same way that the state is arguing  
10 hypocritically with respect to the need for FONSI, it is acting  
11 hypocritically in terms of arguing for the needs for  
12 alternatives.

13 The -- the state has actually refused to consider any  
14 alternatives when it comes to its own \$10.7 billion highway  
15 expansion. The state's argued, for example, that the -- that  
16 there should have been consideration of carpooling. Well, they  
17 completely rejected that alternative, wouldn't even consider it  
18 when it comes to their own project.

19 Your Honor, I -- I do believe -- I will sum up.

20 THE COURT: No, no. One minute.

21 MR. REICHMAN: Okay. Yeah. You -- you know,  
22 your Honor has rightly said, well, you know, you should look  
23 at -- at past practices of an agency, you know. And -- and it  
24 is one of the buckets that your Honor identified.

25 Well, perhaps even more relevant is the current practice

1 of New Jersey, where it is taking position after position  
2 that's contrary to the ones that it is taking here.

3 THE COURT: Thank you, Mr. Reichman.

4 MR. REICHMAN: Thank you.

5 THE COURT: Mr. Otis, you are up.

6 MR. OTIS: Thank you, your Honor.

7 THE COURT: You are on the clock.

8 MR. OTIS: Your Honor, I have the privilege of  
9 representing 11 groups that represent a broad range of  
10 interests from environmental justice, including WE ACT for  
11 Environmental Justice, the -- one of the oldest environmental  
12 justice organizations in the Tri-State area and in the country,  
13 ranging to the Real Estate Board of New York, all of which  
14 support the congestion pricing program. And they support it  
15 because it battles the twin evils of the status quo, congestion  
16 and air pollution.

17 Your Honor, I want to just take a minute and give the  
18 Court a little more context about the program as a whole and  
19 why my clients support it. And I want to refer your Honor to  
20 Table 10-11 and 10-12, which were given to you by the MTA.  
21 They are marked DOT\_0036855.

22 Shall we?

23 THE COURT: Okay.

24 MR. OTIS: This table --

25 THE COURT: They were given to me today?

1 MR. OTIS: They were given to you yesterday,  
2 your Honor.

3 THE COURT: Okay. Walk me through --

4 MR. OTIS: So -- okay.

5 THE COURT: -- and we will take some notes.

6 MR. OTIS: Sure. What this table shows is VMT and a  
7 bunch of air pollutants, they happen to be hazardous air  
8 pollutants. I am using this table because it is already in  
9 evidence. It could be other air pollutants as well. These are  
10 representative.

11 It shows the CBD only, the entire county, and then it  
12 shows various study areas. And it shows the reduction in VMT  
13 in the base year of 2020 -- or the year 2023 in the  
14 implementation of Scenario A. And then it shows the reduction  
15 in 2045.

16 The key point of this table, your Honor, tells the  
17 entire story of the environmental assessment of the congestion  
18 pricing program. There are significant reductions in both VMT  
19 and air -- air pollution in the CBD and Manhattan. There are,  
20 absolutely, some increases in Bergen County. Also happened to  
21 be larger increases in Staten Island, but I guess they didn't  
22 hire Mr. Mastro, so their -- their -- you know, their increase  
23 s are not part of this litigation.

24 So the point here is, your Honor, the overall region,  
25 as has been said by my colleague Mr. Reichman, and by the MTA,



1 will benefit from the congestion pricing program.

2 Yes, there will be some potential diversionary impacts.  
3 And those impacts are dealt with in the Mitigation section,  
4 which I'm going to get to in a minute.

5 But this is consistent, your Honor, with what we have  
6 seen in other congestion pricing programs that have been  
7 implemented around the world. The London program is an  
8 excellent example. Similar in size to the -- to the -- the  
9 London congestion area, eight miles. It is similar in size to  
10 the New York congestion area.

11 London is the center -- business center and financial  
12 center of -- of a given region, as is New York City. There is  
13 a cordon around the London congestion area, as there will be a  
14 cordon around the central business district in New York City.

15 And what that program has shown since its implementation  
16 in 2020 -- or in 2003, is a consistent reduction in both  
17 vehicle miles traveled and pollution, with minimal, if any,  
18 impacts in the surrounding area.

19 So I want to then talk about mitigation, your Honor.

20 THE COURT: Well, before we do that.

21 MR. OTIS: Yeah.

22 THE COURT: So is the crux of your argument to focus  
23 on the VMTs and the congestion and pollution issue or factor a  
24 consideration, right, as opposed to revenue generation?

25 MR. OTIS: No, your Honor, I want to get to that.

1 THE COURT: Okay.

2 MR. OTIS: Because we don't see funding for the MTA as  
3 merely revenue generation.

4 As Mr. Reichman -- Reichman had -- or Reichman, I'm  
5 sorry, had suggested, and we -- and -- and we will say, we see  
6 funding as the -- of the MTA as an important part of this  
7 overall project. It is a two-prong project, which is -- which  
8 is designed to --

9 THE COURT: But it is one of the key considerations --

10 MR. OTIS: Absolutely.

11 THE COURT: -- spelled -- spelled out, correct?

12 MR. OTIS: Right. That's right.

13 And -- and in addition -- raising money for the MTA is  
14 not, as the plaintiffs would have you believe, lining the  
15 pockets of Mr. Lieber, who they referenced when he was here  
16 last time. All they really needed to do was a put a monocle on  
17 him, a top hat and some spats and put a wheelbarrow of money in  
18 front of him and make him, your know, turn the MTA into a  
19 money-grubbing machine.

20 No, your Honor.

21 The purpose of raising the money for the MTA is to make  
22 transit more attractive, to encourage people to switch from  
23 driving, one mode, driving their cars, to another mode, using  
24 transit for all the benefits identified by Mr. Reichman.

25 So I -- we don't see it. Our clients don't see that as,

1 you know, simply a revenue generation and that's it.

2 We believe that the benefits of the MTA funding will  
3 also accrue to the people from New Jersey who use the MTA.  
4 Those signal benefits, those signal changes that are going to  
5 improve throughput, through the MTA, will not automatically  
6 shut off when someone from New Jersey steps onto an MTA  
7 railcar. Those 70 ADA projects that will be funded through  
8 this project will not -- the elevator will not stop working  
9 with somebody -- when somebody from New Jersey rolls up and  
10 needs it to get from one part of the station to another.

11 So the notion that this is somehow a revenue grab for  
12 the MTA and there is no benefit to New Jersey it just simply  
13 not correct.

14 I do want to talk about mitigation, your Honor. And I  
15 do want to talk about two things.

16 You have heard a lot about the -- and I want to refer  
17 to -- your Honor, you have seen this -- this chart a number of  
18 times. This is the mitigation chart.

19 And, your Honor, you have been told about the parts of  
20 the CFR that require mitigation. You have gone through the  
21 language over and over again. I'm not going to recite it, but  
22 that language does not require a specific payment to a state  
23 entity or a county entity.

24 Bergen County and the State of New Jersey have said to  
25 you over and over again, where is the money? We're not getting

1 any money. We are not being paid.

2 The purpose of mitigation, your Honor, is to identify  
3 effects and then develop programs to mitigate those effects,  
4 and then to fund those programs. And then, as counsel for  
5 Bergen County said, to make them enforceable.

6 And that is in the Federal Highway's rules  
7 at 23 CFR 771.109, which says, The FHWA will ensure that the  
8 mitigations that are in the FONSI is accomplished as part of  
9 its stewardship and oversight responsibilities. So  
10 incorporation of the mitigation into the FONSI achieves the  
11 enforceability that it -- that Bergen County counsel required.

12 Now, I also, though, want to talk about, your Honor, the  
13 State of New Jersey has said, well, it is all promises and  
14 there is no real -- there is no real beef here.

15 THE COURT: So if you don't want to talk about it,  
16 don't talk about it. You have two-and-a-half minutes to go,  
17 talk about what you really need to talk about.

18 MR. OTIS: No, I said I do want to talk about it.

19 THE COURT: Okay.

20 MR. OTIS: So I am going to talk about it.

21 So Table 17-16 provides a list of specific mitigation  
22 activities. Some are regional. Some are local. These guys  
23 have complain -- I'm sorry. The State of New Jersey and Bergen  
24 County have complained that there is no specific payment to  
25 them in this list. But that's not the purpose, your Honor.

1           The purpose of these mitigation measures is to address  
2 the impacts that were identified in the EA.

3           Furthermore, they have cited the EPA and said, well, the  
4 EPA said there were a lot of problems with the draft  
5 environmental assessment. And they -- they also say that the  
6 promise, the commitment to do future activities -- adaptive  
7 management as it is called -- is insufficient. Thank you,  
8 your Honor.

9           I want to read to you from DOT\_045366. This is the  
10 email that the EPA sent to the FHWA. It is from Lisa Garcia.  
11 And it -- it describes not only their approval of the revised  
12 environmental assessment, but it says, EPA encourages FHWA and  
13 the project sponsors to consider including a commitment to  
14 develop an adaptive management plan during and/or after the  
15 selection of the final tolling structure by the Traffic  
16 Mobility Review Board to assess and evaluate the feasibility of  
17 all mitigation based on the final tolling structure, determine  
18 the best way to adjust for potential impacts throughout the  
19 entire lifecycle of the final project.

20           My clients believe that this commitment to adaptively  
21 manage going forward is key to the implementation of this  
22 program. And we have seen that in London, your Honor.

23           THE COURT: So you are suggesting that the reading by  
24 the plaintiffs is too narrow, and that the regulation creates a  
25 scheme that envisions an iterative process?

1 MR. OTIS: Yes, your Honor.

2 The regulation creates a scheme that requires the  
3 development of mitigation measures to -- to mitigate identified  
4 impacts. Part of that process is an adapt -- can be an  
5 adaptive management plan. We view that as a positive. It  
6 happened in London. There are a bunch of different dials that  
7 administrators can use to adjust these -- these -- adjust the  
8 impacts of a congestion pricing plan. They do it in London.  
9 They can do it here.

10 And with that, I conclude my remarks and --

11 THE COURT: Thank you, Mr. Otis.

12 MR. OTIS: -- and may respond to any questions you may  
13 have.

14 THE COURT: We're good. Thank you.

15 MR. OTIS: Thank you.

16 THE COURT: You have answered the questions along the  
17 way.

18 All right, ladies and gentlemen. We are now  
19 at 11 o'clock where we were, theoretically, supposed to be at  
20 9:30 this morning.

21 We have two hours reserved for New Jersey participation.

22 My question to counsel on both sides is: Do we need two  
23 hours or do you think we might be able to do this in an hour  
24 and a half, which would get us to 1 o'clock?

25 Ms. Myers, we will hear from you.

1 MS. MYERS: We --

2 THE COURT: I'm sorry. So, Ms. Myers, we're going to  
3 hear from you?

4 MS. MYERS: Yes.

5 THE COURT: This is going to be your opportunity.

6 MS. MYERS: Yes.

7 THE COURT: Okay. So my question to you is, we  
8 theoretically have reserved 60 minutes, can we do this in 40  
9 to 45 --

10 MS. MYERS: Yes.

11 THE COURT: -- including reserving rebuttal time?

12 MS. MYERS: Yes.

13 THE COURT: Okay. Mr. -- Ms. Howard, are you up on  
14 this? Or is Mr. Cumming up on this?

15 MS. HOWARD: No, your Honor, it is Mr. Cumming.

16 THE COURT: Mr. Cumming, can we do this in roughly 15  
17 to 20 minutes for --

18 MR. CUMMING: Yes.

19 THE COURT: -- for you?

20 Mr. Chertok, who is speaking on New Jersey  
21 participation?

22 MR. CHERTOK: I will, your Honor.

23 THE COURT: So we scheduled 35. Can we do this in  
24 about 20 or 25?

25 MR. CHERTOK: We should be able to.

1 THE COURT: Okay. Fine. We are going take a  
2 two-minute stretch break. It is 11:33. We back on the record  
3 at 11:35.

4 (Recess taken 11:33 a.m. to 11:37 a.m.)

5 THE COURT: We are back on.

6 Ms. Myers, you are up. New Jersey participation.

7 Ms. Myers.

8 MS. MYERS: Yes.

9 THE COURT: How are you going to break your time?

10 MS. MYERS: I am going to take 10 minutes for  
11 rebuttal.

12 THE COURT: So We are giving you 35 to start.

13 MS. MYERS: Can you hear me?

14 THE COURT: You are. You are on the clock.

15 (An off-the-record discussion was held.)

16 MS. MYERS: Thank you, your Honor.

17 We're going to talk about New Jersey agency consultation  
18 and public participation.

19 To set the stage here, the federal government failed to  
20 solicit New Jersey State and local agencies as it is required  
21 to do under its own regulations and, therefore, failed to  
22 afford New Jersey agencies a meaningful and early opportunity  
23 to engage in substantive meetings and dialogue regarding the  
24 impacts on New Jersey.

25 The FHWA --



1 THE COURT: Wait. Stop.

2 MS. MYERS: Yes.

3 THE COURT: Some New Jersey agencies were contacted  
4 and did participate.

5 MS. MYERS: Yes.

6 THE COURT: Correct?

7 MS. MYERS: Yes.

8 THE COURT: So you're saying the obligation on the  
9 Federal Highway Administration is to find a way to identify  
10 every state agency who may need to participate?

11 MS. MYERS: No. I'm saying that the federal  
12 government's obligation is to consult the relevant agencies.  
13 So if we look at the next slide.

14 THE COURT: So if they consult some, but not all, then  
15 they are in violation of what's required?

16 MS. MYERS: If they don't consult the relevant  
17 agencies who have the expertise to advise on a specific  
18 project, then our position is that they did not.

19 THE COURT: Who defines relevant?

20 MS. MYERS: Sure. So if you look at 40 CFR  
21 Section 1501.5(e) and 1506.6(a). First it says, The federal  
22 regulations require FHWA to involve state and local government  
23 and relevant agencies to the extent practicable.

24 So that is our starting standard.

25 THE COURT: So that means there is some discretion and

1 wiggle room for the FHWA?

2 MS. MYERS: Yes. And then the next -- their provision  
3 states at 23 CFR 771.111(e), Other States that may be  
4 significantly affected by the action must be notified early and  
5 their views solicited by the applicant in cooperation with the  
6 FHWA.

7 THE COURT: So you, again, would you agree that there  
8 is some element of discretion here that can be exercised by the  
9 FHWA? Or are you saying that there is an absolute mandatory  
10 obligation?

11 MS. MYERS: There is discretion, but I think their  
12 discretion --

13 THE COURT: And so what you are challenging is the  
14 exercise -- is the reasonableness of the exercise of that  
15 discretion?

16 MS. MYERS: Exactly.

17 THE COURT: Okay. Continue.

18 MS. MYERS: In exercising their discretion --

19 You can go to the next slide at 109.

20 Look at the chart of how many agencies the FHWA  
21 consulted. Let's start with New York. Total number of  
22 agencies or government offices consulted, 17. I would like to  
23 note that we have this information from what's available in the  
24 record. I'm not speculating that there may have been more  
25 meetings with New York, though I suspect there were, but this

1 is what we have available based on what is in the  
2 administrative record. There were 17 agencies in total. There  
3 were four for New Jersey. Number of environmental agencies  
4 consulted, there were three from New York and zero from  
5 New Jersey. These are the types of agencies that should have  
6 been consulted under the regulations and FHWA's exercising of  
7 its discretion. May be significantly affected. They have to  
8 consult the relevant agencies. New Jersey department of  
9 environmental protection --

10 THE COURT: Well, you just used the mandatory word.  
11 They have to. A few moments ago you indicated there is some  
12 discretion exercised by the Federal Highway Administration. So  
13 is it the hoped for position? Or is it the required position?

14 MS. MYERS: So the FHWA's regulation use both may and  
15 must. That is where the combo comes in here.

16 THE COURT: Okay. Are we talking about participating  
17 entities or are we talking, as defined by the reg, about  
18 cooperating entities?

19 MS. MYERS: We are talking about participating.

20 THE COURT: Okay. Can an entity that believes that  
21 the FHWA did not invite them self-nominate to be a  
22 participating agency?

23 MS. MYERS: Sure. So we can talk about --

24 THE COURT: And why didn't the New Jersey agencies who  
25 were not selected initially self-nominate?

1 MS. MYERS: First of all --

2 THE COURT: They are all part of the executive branch  
3 of the State of New Jersey. Are they not? I assume that they  
4 communicate with each other particularly on a project of this  
5 significance and importance. So help me out here.

6 MS. MYERS: Sure. I -- I'll start with the first  
7 question on participating versus cooperating, if that's okay.

8 THE COURT: Okay.

9 MS. MYERS: Okay. So 40 CFR Section 1501.8(a), allows  
10 but does not require a state or local agency with -- with  
11 special expertise with respect to environmental issues to be a  
12 cooperating agency by agreement with the lead agency.

13 That would be the FHWA here.

14 The MTA, who raised this argument for the first time in  
15 their briefing, admits also in their briefing that, It is  
16 entirely within the lead agency's discretion to identify the  
17 participation -- the participating agencies, who is not  
18 New Jersey's burden to insert itself into a federal review  
19 process where the federal government included the relevant  
20 New York agencies and did not include the relevant New Jersey  
21 agencies.

22 THE COURT: Do we know the criteria that the FHWA  
23 utilized to determine who would be a participating entity on  
24 either side of the river, or for that matter, any other place  
25 in the Tri-State area?

1 MS. MYERS: We do not know that.

2 THE COURT: That was not explained in the EA or the  
3 FONSI. Correct?

4 MS. MYERS: Correct.

5 THE COURT: So it is a black box as to why, what the  
6 rationale was for selecting a certain number with respect to  
7 the State of New York and a different number with respect to  
8 the State of New Jersey.

9 MS. MYERS: But specifically with respect to the  
10 environmental agencies.

11 We concede and recognize that New Jersey transportation  
12 agencies were consulted. We do not know why New Jersey  
13 environmental and health agencies were not consulted. And we  
14 don't have information on that latter part.

15 THE COURT: And there is no explanation as to that  
16 differentiation?

17 MS. MYERS: Not as far as we are aware.

18 THE COURT: Okay. What is the make-up of the 17  
19 agencies in New York?

20 MS. MYERS: Sure. So a -- a couple different  
21 organizations. If you look at --

22 THE COURT: So from looking at your chart, there were  
23 zero environmental agencies consulted in New Jersey. All  
24 right. Is New Jersey's position that you are dissatisfied with  
25 the consultation/selection process focusing on the

1 environmental agencies? Or on the environmental agencies and  
2 the transportation entities? Or both?

3 MS. MYERS: Our position is that we are dissatisfied  
4 with the participation, or lack thereof, from the environmental  
5 agency and the Department of Health.

6 THE COURT: And the Department of Health. Okay.

7 So we're not worried about any, my words, disparate  
8 treatment with respect to the transportation entities, that's  
9 not of your concern.

10 MS. MYERS: Correct. Though I will note that we do  
11 raise in our briefs that NJTA, New Jersey Turnpike Authority is  
12 not -- has a limited participation within that organization,  
13 but we're not challenging whether or not they adequately  
14 consulted New Jersey transportation agencies.

15 THE COURT: Okay. So we're concerned principally with  
16 the lack of participation -- no, I'm going to choose a  
17 different word -- the lack of involvement by the relevant  
18 New Jersey environmental and health agencies.

19 MS. MYERS: Correct.

20 THE COURT: Did these New Jersey entities  
21 participate -- were they involved in a -- as a cooperating  
22 party in any way?

23 MS. MYERS: No, your Honor.

24 THE COURT: So they were outside the process as far as  
25 the State of New Jersey's position is concerned?

1 MS. MYERS: Correct.

2 THE COURT: Continue, Ms. Myers.

3 MS. MYERS: Okay. You asked, what are the 17 New York  
4 agencies. We filed a chart on the docket at 136-3, which lists  
5 all of the agencies. So the New York 17 were: MTA --

6 THE COURT: No, just bucket them for me.

7 MS. MYERS: Okay.

8 THE COURT: Transportation versus health and  
9 environment.

10 MS. MYERS: Of course. So the break down of that is  
11 here.

12 So three environmental agencies from New York on the  
13 first --

14 THE COURT: And zero for New Jersey.

15 MS. MYERS: -- zero New Jersey, one of the public  
16 health agencies from New York and zero from New Jersey.

17 THE COURT: Okay. So we have four that fit into the  
18 double bucket of environment and health from New York. Zero on  
19 the part of New Jersey.

20 MS. MYERS: Correct.

21 THE COURT: Okay. And we do not know the reasons as  
22 to why Federal Highway Administration included those four and  
23 chose not to include the relevant number from New Jersey.

24 MS. MYERS: Correct.

25 THE COURT: Continue.

1 MS. MYERS: And the federal government, when it lists  
2 the agencies that did participate -- that it did consult with  
3 from New Jersey in its briefing, it does only list the  
4 transportation agencies. So it doesn't dispute, it is  
5 undisputed that New Jersey DEP, Department of Environmental  
6 Protection and DOH, Department of Health were not consulted  
7 throughout this process.

8 THE COURT: Okay.

9 MS. MYERS: So that's the first part of our argument.  
10 The second part, turning to the transportation agencies,  
11 is what exactly were the transportation agencies invited to and  
12 whether or not that rose to the level of diligent efforts as  
13 required under the statute.

14 So this is a list of --

15 THE COURT: So your terminology, diligent efforts? Or  
16 where does that -- where does that standard come from?

17 MS. MYERS: Sure. So that is from 40 CFR Section  
18 1506.6(a) that I cited earlier.

19 THE COURT: Okay.

20 MS. MYERS: The New Jersey transportation agencies  
21 were only invited to three informational briefings before the  
22 draft EA was published.

23 The first meeting they were invited to was two years  
24 after congestion pricing became law. This was on  
25 September 10, 2021, and they were invited to a virtual briefing



1 hosted by the project sponsors.

2 At this meeting, New York City Department of  
3 Environmental Protection and New York City Mayor's Office of  
4 Environmental Coordination were involved, but, again, like I  
5 said earlier, DEP from New Jersey was not.

6 THE COURT: Are there any posted practices or guidance  
7 from the Federal Highway Administration that provide any sense  
8 as to under what circumstances participating entities are going  
9 to be invited to a meeting, or, for that matter, whether  
10 cooperating parties may be invited to those same meetings?

11 MS. MYERS: I am not aware of any specific ones but if  
12 FHWA has ones, I am sure they will refer you to them.

13 THE COURT: Ms. Myers, I am an equal opportunity  
14 questioner.

15 MS. MYERS: Of course.

16 THE COURT: When the defendants get up here, I am  
17 going to be asking the same questions.

18 MS. MYERS: But I will note that I think the standard  
19 here that we are looking at in evaluating the FHWA's actions  
20 should be compared against what the project was looking at, so  
21 what the final EA involved.

22 Obviously, it involved air quality.

23 We know, we just spent hours on that, and the  
24 environmental justice and what they did vis-a-vis New York.

25 I am not suggesting that they needed to invite the same

1 amount of New Jersey agencies as they did New York agencies.  
2 We fully recognize this is a project being implemented by  
3 New York but going back to my first point, they should have  
4 invited the relevant New Jersey agencies.

5           These are the meetings.

6           After --

7           THE COURT: What you are looking for is some  
8 understanding of the differentiation as to why and why not.

9           MS. MYERS: And the differentiation, in our opinion,  
10 was arbitrary and unlawful.

11           THE COURT: I got it.

12           MS. MYERS: The second meeting, March 11, 2022, the  
13 MTA held a briefing with New Jersey Transit to discuss an  
14 increase in pedestrian volume at a single stairway in the  
15 Hoboken Terminal and PATH station -- which our transportation  
16 agency went to, two meetings essentially -- before the draft EA  
17 was prepared because then the third meeting was a mere six days  
18 before publication of the draft EA.

19           And New Jersey --

20           THE COURT: Is there something inherently wrong with  
21 that time period?

22           Does it violate some regulation or practice or notion of  
23 fairness?

24           MS. MYERS: It violates a notion of fairness when you  
25 compare it to the amount of meetings held before the draft EA

1 was published with New York.

2 THE COURT: How do I draw the line? Where do I draw  
3 there line?

4 If six days is not enough, is seven days? Is eight  
5 days? Is ten days? Three weeks?

6 What is my benchmark?

7 You are me, Ms. Myers. How do I address your point?  
8 How do I write that in an opinion?

9 MS. MYERS: Our argument is not that we're advocating  
10 for a specific number of days that it should have been before.

11 We're highlighting the lack of meaningful engagement in  
12 these meetings prior to the publication of what was essentially  
13 --

14 THE COURT: Not to the reasonableness of the proximity  
15 to the EA. Correct?

16 MS. MYERS: Correct.

17 THE COURT: Okay.

18 MS. MYERS: So the draft EA was published on  
19 August 10, 2022, and --

20 THE COURT: So the six-day date is an example of what,  
21 in your view, is unreasonable about the engagement process --

22 MS. MYERS: Yes.

23 THE COURT: -- not the fact that it was in such close  
24 proximity that, somehow or other, the Court has to enunciate  
25 some rule of reason that pushes that date back.

1 MS. MYERS: Correct.

2 And we think it goes to -- which I will discuss later  
3 with the comment letters -- the ability of our transportation  
4 agencies, the ones who were invited, to meaningfully comment on  
5 the materials when they were presented with them a mere  
6 six days before they were published and then they  
7 were 4,000 pages, and we will talk about the public comment  
8 period in a bit, if that's okay.

9 THE COURT: This is the public comment period  
10 associated with...

11 MS. MYERS: After the draft EA was published.

12 THE COURT: After the draft, between the draft and the  
13 final.

14 MS. MYERS: Correct.

15 THE COURT: Okay.

16 MS. MYERS: So between the draft and the final,  
17 New Jersey transportation agencies were not invited to any more  
18 meetings. After the draft EA was published on August 10, 2022,  
19 before the final on May 5, 2023, no more meetings with the  
20 transportation agencies.

21 THE COURT: Inherent in that statement is that there  
22 were meetings to which others were invited.

23 MS. MYERS: We -- just looking at my list of dates. I  
24 am not aware, based on what is in the record of agenda on  
25 meetings, how many occurred during the time of the draft and

1 the final.

2 THE COURT: Let's just be basic. I am not worried  
3 about how many.

4 Were there meetings that occurred between the draft and  
5 the final to which New Jersey representatives were not invited  
6 or there were no meetings that occurred between the draft and  
7 the final; therefore, nobody could have been invited? Which is  
8 it?

9 MS. MYERS: There were meetings between the draft and  
10 the final and New Jersey was not invited.

11 THE COURT: We have got disparate treatment --

12 MS. MYERS: Correct.

13 THE COURT: -- for the same class of entities in terms  
14 of their involvement as a participating party.

15 Correct?

16 MS. MYERS: If we are considering New Jersey  
17 transportation agencies as participating, yes.

18 THE COURT: Right. Because participating and  
19 cooperating have two very different meanings with respect to  
20 their rights regarding the process.

21 MS. MYERS: Correct.

22 THE COURT: We are focused on the rights associated  
23 with participating parties fully understanding that the  
24 environmental and health people are outside.

25 MS. MYERS: Exactly.

1           THE COURT: So any diminution of rights, we are  
2 talking about as to the transportation entities. The health  
3 and environmental people couldn't be asserting those rights  
4 because they weren't in the process to begin with.

5           MS. MYERS: Exactly.

6           THE COURT: I got it.

7           MS. MYERS: On May 5, 2023, the final EA and draft  
8 FONSI were published and on May 11th, New Jersey transportation  
9 agencies were invited to a virtual briefing of the final EA but  
10 at that point, the final EA was final. The draft FONSI was --  
11 the FONSI was still in draft form.

12           THE COURT: Did the New Jersey transportation  
13 entities, at any point between the draft and the final, assert  
14 the issue of the exclusion of the environmental and health  
15 agencies of New Jersey from the process?

16           MS. MYERS: Yes.

17           THE COURT: Did they provide notice and argument on  
18 that issue?

19           MS. MYERS: Yes. There were in the  
20 September 23, 2022, letter, which is at Bates DOT\_0007772. On  
21 the first page of the letter, Governor Murphy writes that the  
22 environmental assessment is long and complex. It is 4,000  
23 pages in total. Six weeks at the end of the summer is  
24 insufficient for review and comment. Due to the lack of public  
25 outreach, few New Jerseyans had the opportunity to comment on

1 the EA and --

2 THE COURT: Did the FHWA respond to that comment?

3 MS. MYERS: They did.

4 THE COURT: The response to that comment is part of  
5 what you are challenging as unreasonable.

6 MS. MYERS: Yes, your Honor.

7 THE COURT: Continue.

8 MS. MYERS: Similarly, on page 4 of that letter, it is  
9 re-raised again that there was not the same outreach to  
10 New Jersey agencies as there were to New York agencies.

11 THE COURT: You are a touch over halfway.

12 MS. MYERS: Okay. Great.

13 I would like to go to slide 112.

14 So you heard yesterday about this New Jersey  
15 Environmental Justice Alliance. Now, let's be clear about what  
16 that is.

17 It is not a state agency. It is not a local agency of  
18 New Jersey. It is a nonprofit, a 501(c)(3), that was invited  
19 to participate in the Environmental Justice Technical Advisory  
20 Group.

21 So our first issue with the reliance on the fact that  
22 this organization participated is that they are not a state or  
23 local agency as required under the federal regulations that I  
24 mentioned earlier.

25 Second, when you look at --

1           THE COURT: But are they any different than the  
2 New York agencies that appear in the third column? Are they  
3 not 501(c)(3)s, and, therefore, don't they suffer the same  
4 infirmity?

5           MS. MYERS: So our second argument there is that there  
6 are 11 on the New York side of the Hudson. There is one on  
7 this side. So it is not that these are different.

8           THE COURT: Well, I am looking at the name. The name  
9 does connote some difference. Right? There seems to be some  
10 relative, what I will say specificity, on the New York side and  
11 an alliance connotes that's a group representing a whole bunch  
12 of subgroups. So pure number counting, I am not quite sure I  
13 understand your point.

14           MS. MYERS: Our point is that it was unreasonable to  
15 consult with 11. Let's take the premise that they're all  
16 nonprofit --

17           THE COURT: How many groups in the alliance in  
18 New Jersey?

19           MS. MYERS: The New Jersey Environmental Alliance is  
20 one group.

21           THE COURT: It does not represent -- it doesn't have  
22 constituent parts that have representatives from 15 other  
23 groups.

24           I mean, you see my problem, Ms. Myers. Right? You have  
25 got an entity described as an alliance, and the question is:



1 Is that a single -- yes, it is a single entity, but is it a  
2 single stand-alone entity like the groups from New York? Or is  
3 it made up of subgroups from which there is a representative  
4 from each one of those groups? So the pure number counting may  
5 not fly as a matter of logic.

6 MS. MYERS: As far as I am aware, based on the  
7 research that we have done on the New Jersey Environmental  
8 Justice Alliance, because it is not part of the state, it is  
9 one organization that represents the alliance. You can come  
10 and be a part of it no matter where you are in the state. It  
11 doesn't say we are just South Jersey or we are just  
12 North Jersey, but it is one group.

13 And I will mention that on the New York side there is a  
14 New York City Environmental Justice Alliance. So if the same  
15 logic is going to apply --

16 THE COURT: I understand. I understand --

17 MS. MYERS: Okay.

18 THE COURT: -- but, you know, be careful about  
19 categorical statements.

20 MS. MYERS: Sure.

21 But I think our point remains that regardless, it is not  
22 a state or local agency --

23 THE COURT: We got it.

24 MS. MYERS: -- that is required under the statute.

25 Let's talk a little bit about public participation. We

1 turn to slide 114.

2 As I mentioned earlier, the NEPA regulations also  
3 require the FHWA to make diligent efforts to involve the public  
4 in preparing and implementing their NEPA procedures.

5 This includes public notice, public meetings, making the  
6 documents available.

7 THE COURT: So there is a set of benchmarks that where  
8 we need to check the box to see whether diligent efforts were,  
9 in fact, made.

10 MS. MYERS: Correct.

11 THE COURT: Are you representing that some of those  
12 boxes were not checked?

13 MS. MYERS: Yes, your Honor.

14 THE COURT: They were not checked at all or you are  
15 unhappy with the degree to which the boxes were checked?

16 MS. MYERS: The latter. We are unhappy with the  
17 degree to which the boxes are checked.

18 THE COURT: It is not a failure on the part of the  
19 FHWA to do something.

20 It is the degree to which they did it that causes you to  
21 stand here today.

22 MS. MYERS: Yes.

23 THE COURT: Okay. That distinction is clear in your  
24 briefs?

25 MS. MYERS: Yes. We don't challenge the public notice

1 period -- I'm sorry, we don't challenge that there was a public  
2 notice period. We challenge how many days that made --

3 THE COURT: Are you talking about implementation,  
4 which is a factual determination, as opposed to the legal duty  
5 to carry out something?

6 MS. MYERS: Exactly.

7 So we talk about in our briefs multiple times how the  
8 FHWA gave the public 44 days to review a 4,000-page draft EA  
9 setting forth, as you know, seven different tolling scenarios.

10 THE COURT: So you argue that 44 days is unreasonable  
11 and arbitrary.

12 MS. MYERS: Correct. Because --

13 THE COURT: Now I will ask you the question I asked  
14 you before. You are me. Where do I move the scale? 45 days?  
15 46 days? 65 days? 165 days? How do I draw the line?

16 MS. MYERS: Sure.

17 I think that as we said multiple times, this is the  
18 first project of the scale in the country. Giving 44 days for  
19 a 4,000-page document, that would equate to reading 100 pages a  
20 day and then preparing your public comments would, in the time  
21 given, is unreasonable.

22 THE COURT: So by that argument, we should be holding  
23 oral argument in this case sometime next year because I have  
24 got a 48,000-page administrative record.

25 MS. MYERS: Actually 4,000 pages is just the draft.

1 The final -- the -- if you include the appendices there was  
2 more, but this is what the public had the opportunity to  
3 comment on and that is why we think giving them 44 days was  
4 inappropriate.

5 THE COURT: So, again, back to my question.

6 You are me. You want me to declare. Right? It is part  
7 of what you are going to be asking for in your relief.  
8 Mr. Mastro is going to stand up later this afternoon and talk  
9 to me about remedy, and he wants me to declare certain things.  
10 Right? What do I declare here? If this is unreasonable, what  
11 guidance do I give the agency? What guidance do I give the  
12 public as to where or how the line should be drawn? It is not  
13 enough to tell me it is unreasonable. You want an outcome.  
14 You have got to help me get there.

15 MS. MYERS: Sure.

16 The regulations require that there is meaningful  
17 consideration by the public. That is 40 CFR 1506.6(a).

18 THE COURT: What are the benchmarks? How do I decide  
19 that? It has got to have some definitional framework. At the  
20 end of the day, it is about reasonableness. I don't want to be  
21 subjective. The last thing we want here is subjective  
22 application. Right? Because that leads to inconsistency. We  
23 don't want subjective standards because we want to have  
24 consistent applications. So the question is: What is the  
25 benchmark that I need to announce in order for there to be

1 consistent application?

2 MS. MYERS: Our position is that what the FHWA offered  
3 the public was not reasonable.

4 THE COURT: I got it.

5 MS. MYERS: We don't have --

6 THE COURT: 44 days doesn't work. I got it.

7 Where do I draw the line, Ms. Myers? You are me. I  
8 have got to leave this oral argument and go back into my  
9 chambers with my legal team and I have to write the opinion  
10 that gives you the answer you want.

11 How do I draw the line?

12 MS. MYERS: The case law that we reviewed in  
13 preparation for this argument is nowhere near the amount of  
14 pages that this draft EA was.

15 THE COURT: Tell me what the case law said and how  
16 they -- and what they said that the benchmark should be. Let's  
17 assume that the amount of pages that needed to be reviewed in  
18 one of these other cases is 2500 pages.

19 How did they draw the line?

20 MS. MYERS: I'm going to -- this is the Ohio --

21 THE COURT: I need help here, Ms. Myers.

22 MS. MYERS: No. I understand your question.

23 THE COURT: I want to give you what you want.

24 MS. MYERS: I completely understand your question.

25 Thank you.

1           The *Ohio Valley Environmental Coalition v. United States*  
2 *Army Corp.*, 674 F Supp. 2d 783 from the District Court of the  
3 Southern District of West Virginia in 2010, applying  
4 Ninth Circuit precedent on public participation says that it  
5 is, Even though the Ninth Circuit found the notice sufficient  
6 in Bering Strait, the case reasoning supports plaintiff's claim  
7 here where, quote, Considered in the totality of the  
8 circumstances the mitigation was the most crucial issue in that  
9 case. As much information as practicable must be provided so  
10 that a member of the public can weigh in on this decision. The  
11 weigh-in has to happen before the close of the public comment  
12 period.

13           This standard, in our -- we submit that this is a  
14 flexible standard that requires consideration in the totality  
15 of the circumstances to make sure that the public has an  
16 opportunity to comment before the close --

17           THE COURT: Ms. Myers, I agree with you. I will  
18 enunciate that standard.

19           Now help me out on the specifics of what you want me to  
20 write in the order.

21           44 day s is not enough.

22           MS. MYERS: Correct.

23           THE COURT: What is enough? 125 days? 365 days?  
24 What is enough?

25           MS. MYERS: Sure.

1 I would say closer to the 125 days to review the  
2 entirety of the 4,000 pages.

3 THE COURT: Thank you. I appreciate you walking  
4 through the process with me.

5 MS. MYERS: No problem.

6 THE COURT: We are at about six minutes to go.

7 MS. MYERS: Let's turn to talking about the comment  
8 letters because you heard a lot about how New Jersey did not  
9 satisfy its participation by not raising things in its comment  
10 letters.

11 So I am going to start with the September comment  
12 letter, which is the one that was submitted in this, you  
13 know, 44-day time period. So that one is at the record -- at  
14 DOT\_0007772.

15 I will read you some excerpts to refute the arguments  
16 that the government made and MTA made yesterday.

17 So if you look first at page 2 of that letter, the  
18 comments state that the model used in the draft EA is not  
19 capturing New Jersey dynamics. Primarily, the regional impact  
20 model is not well validated at the level of New Jersey, only a  
21 generalized analysis was done in New Jersey. It fails to  
22 perform the fine-graded analysis of different markets within  
23 New Jersey as it does with New York, which Mr. Mastro showed  
24 multiple times the discrepancies between what they did in  
25 New Jersey and New York.

1           It then talks about equity in environmental justice  
2 concerns.

3           On the next page it talks about the air quality  
4 analysis, and they show negative results. It talks about new  
5 traffic patterns that will need to be studied and how the  
6 diversion of traffic will impact the environmental justice  
7 communities. That was also not there.

8           It talks about, in general, there was an insufficient  
9 analysis for New Jersey and then it says, which I think is most  
10 critical here, The draft EA at that time did not commit to any  
11 mitigation. The charts that we look at outlining  
12 the 155 million, that was not in the draft. And in  
13 New Jersey's September letter, we say, What analysis has been  
14 done to demonstrate that you anticipate the diversions and how  
15 do you propose to mitigate those impacts? And the EPA  
16 similarly in its September letter raised this.

17           If you look at the final EA, you can tell because when  
18 things were added from the draft to the final, they are both in  
19 italics.

20           In this section on mitigation that we keep talking about  
21 in appendix 17D where we go through the charts, that is bold  
22 and italics before we get to the breakdown of the regional and  
23 the place-based measures.

24           So the argument that New Jersey did not adequately  
25 comment on the lack of mitigation is underscored by the fact --



1 is undercut by the fact that that information was not in the  
2 draft EA.

3 THE COURT: So is it your position that the  
4 September 23rd letter contains sufficient information to  
5 provide reasonable notice -- or to put the FHWA on notice as to  
6 the areas of concern from the State of New Jersey, that they --  
7 answer that question first.

8 MS. MYERS: Yes.

9 THE COURT: And that the language contained in that  
10 letter was not mere illusions to things without sufficient  
11 specificity to provide reasonable notice to the FHWA.

12 MS. MYERS: Our position is that it was as specific as  
13 it could be given the information that we were given.

14 THE COURT: So, therefore, it is your position that in  
15 no way, shape, or form, did the State of New Jersey fail to  
16 notify the agency, nor fail to exhaust its administrative  
17 remedies or waive any of the issues.

18 MS. MYERS: Absolutely.

19 And the EPA went even further than our letter at  
20 DOT\_0045032. It starts with a whole section on mitigation  
21 continuing to 034 and how the project sponsors must propose a  
22 comprehensive mitigation package particularly focused on  
23 reducing the impacts to areas with environmental justice  
24 concerns for each tolling scenario.

25 THE COURT: Was that EPA letter filed before or after

1 the September 23 letter?

2 MS. MYERS: Our letter and the EPA's letter were filed  
3 on the same day, which was September 22.

4 THE COURT: How did you alert the FHWA to the fact  
5 that you were -- what I think you are going to say to me is you  
6 are endorsing or incorporating by reference the comments from  
7 the EPA?

8 MS. MYERS: New Jersey wasn't given the EPA's comments  
9 beforehand, but --

10 THE COURT: You didn't see them until after the  
11 publication of the final?

12 MS. MYERS: No. The comments were published, I am  
13 pretty sure, in between the draft and the final.

14 THE COURT: But once those comments were published,  
15 that was, theoretically, outside the comment period. Correct?

16 MS. MYERS: Correct. Well, I would like to discuss  
17 the June letter briefly.

18 THE COURT: Well, okay.

19 MS. MYERS: I just want to note that there is  
20 established case law, and I will get it from my pile, in the  
21 Third Circuit that a party does not waive an issue if it was  
22 either so obvious to the agency or someone else raised it, and  
23 the EPA clearly raises this issue.

24 THE COURT: Okay. That is Third Circuit law. At some  
25 point, you will tell us what that case is. We are going to

1 give you about two more minutes.

2 MS. MYERS: It is 869 F.3d 148. It is the *Delaware*  
3 *Riverkeeper* case.

4 So the June letter -- you have heard that the June  
5 letter should not be considered either but the FHWA and the MTA  
6 admit that they had another public review period after the  
7 final EA and the draft FONSI. Now, the FONSI, as you know, is  
8 a document that is supposed to explain mitigation.

9 THE COURT: Well, they admitted that they had another  
10 public review period.

11 My understanding is that there was a period of time in  
12 which the final EA was publicly available. Right? We are  
13 talking about the public availability period?

14 MS. MYERS: Correct. And the draft FONSI was  
15 published at that time.

16 THE COURT: What do the regs say about what is  
17 permissible during that public availability period? Or what is  
18 the past practice?

19 Is there, in fact, an opportunity for the submission of  
20 public comments? Is it provided for in agency practice or in  
21 regulation? I mean, I am going to sit here and ask Mr. Cumming  
22 what is supposed to go on during the public availability  
23 period. I'm not sure I know the answer to that because I am  
24 not sure it is clear anywhere.

25 MS. MYERS: I -- I agree with your Honor. And I think

1 the relevant inquiry should be what FHWA and MTA said here.

2 They said there was a public comment period between  
3 the -- the publication of the draft FONSI and the final. And  
4 they had an open date and a close date. And they admit that  
5 they reviewed the letters they received during that period.

6 THE COURT: Was the June letter submitted...

7 MS. MYERS: During that period.

8 THE COURT: It was submitted during the public  
9 availability period?

10 MS. MYERS: Yes, between the draft FONSI and the final  
11 FONSI. And --

12 THE COURT: And it was submitted shortly before the  
13 close of that period. Correct?

14 MS. MYERS: Correct.

15 THE COURT: Okay.

16 MS. MYERS: And FHWA and MTA said they considered  
17 them, they just didn't think anything needed to change. So --

18 THE COURT: Well, that's fine. That is their  
19 prerogative.

20 MS. MYERS: I -- I don't -- I don't disagree, but they  
21 can't now come in and say that the issues we raised were  
22 waived.

23 THE COURT: That is a different story.

24 MS. MYERS: I agree.

25 THE COURT: That is a completely different story.

1 I will give you one more minute to conclude.

2 MS. MYERS: Just closing the loop there, I would like  
3 to suggest that the Court should consider the June 12, 2023  
4 letter.

5 One more thing I want to say about public comment before  
6 we close. You heard a lot about the supplemental review period  
7 that's going on now. There is no public comment on that -- on  
8 that supplemental review.

9 There is going -- and the FHWA said yesterday it will be  
10 done in a silo. And now we know we have a final tolling scheme  
11 that differs from the ones the public got to comment on.

12 I know we all disagree on the degree of difference  
13 between the proposed and the final, but the truth remains that  
14 the -- every component is different and there will be no public  
15 comment on that.

16 THE COURT: Okay.

17 MS. MYERS: Thank you.

18 THE COURT: You are welcome. Hold on. Hold on.

19 MS. MYERS: Yes.

20 THE COURT: Ms. Myers, don't go anywhere.

21 (An off-the-record discussion was held.)

22 THE COURT: Ms. Meyers, if I can direct your attention  
23 to slides 112 and 114.

24 MS. MYERS: Yes.

25 THE COURT: 112 deals with the -- the -- the EJTAG

1 membership.

2 MS. MYERS: Yes.

3 THE COURT: Do these groups, or does the FHWA invite  
4 them?

5 MS. MYERS: I am not aware.

6 THE COURT: Okay.

7 Mr. Cumming, same question for the ICG membership. You  
8 are not aware, self-nomination or FHWA invitation?

9 MS. MYERS: I --

10 THE COURT: Now you're trusting --

11 MS. MYERS: They were --

12 THE COURT: I am surprised Mr. Mastro is not writing  
13 you notes. He is supposed to reciprocate for all that you did  
14 for him in the first day and a half.

15 Mr. Mastro.

16 MR. MASTRO: She is doing a great job. I don't need  
17 to pass her anything.

18 THE COURT: Well, what do we know?

19 MS. MYERS: They were invited, both groups.

20 THE COURT: By the FHWA.

21 MS. MYERS: By the FHWA, yes.

22 THE COURT: All right. Was there a self-nomination  
23 process? Do we know?

24 MS. MYERS: That we're not -- we're not aware.

25 THE COURT: Okay. Fine. Slide 114 on the 44 days --

1 MS. MYERS: Yes.

2 THE COURT: -- did any New Jersey entity ask for an  
3 extension of time, was that even possible?

4 MS. MYERS: Yes, on the first page of our September  
5 letter, we said this was an insufficient amount of time, and  
6 then New Jersey Transit reiterated that and requested more  
7 time.

8 THE COURT: And the FHWA rejected that?

9 MS. MYERS: I'm pretty sure they gave more time than  
10 originally contemplated, so the 44 days was the extension time.

11 THE COURT: Well, now you have got me thoroughly  
12 confused, Ms. Myers.

13 MS. MYERS: I am sorry.

14 THE COURT: You stood up here and you told me there  
15 was a 44-day comment period and it is insufficient given the  
16 volume of the documents. And now you are telling me that an  
17 extension was granted and that was the 44-day period.

18 So the question is what was the initial window?

19 MS. MYERS: I am pretty sure it was 30 days, but I  
20 will confirm that.

21 Yes, it was 30. The initial window was 30 days due to  
22 public --

23 THE COURT: Now -- so now, Ms. Myers, you spent a fair  
24 amount of the Court's time attempting to have the Court believe  
25 that there was an insufficient amount of time granted to the

1 State of New Jersey and for that matter others to comment on  
2 the volume of the documents.

3 And I was trying to identify what's a reasonable  
4 benchmark asking you to put yourself in my shoes and figure out  
5 how I am supposed to back this up. And that's all for naught  
6 because the period was 74 days.

7 MS. MYERS: No.

8 THE COURT: And the question is, is 74 days  
9 insufficient?

10 MS. MYERS: No, I'm -- I'm sorry. I -- I absolutely  
11 do not mean to confuse anyone.

12 THE COURT: Well, you did.

13 MS. MYERS: I -- I apologize.

14 We are not challenging -- the third --

15 THE COURT: No, I understand. But you are standing  
16 here telling me -- leading the Court to believe that there was  
17 an inadequate, unreasonable amount of time provided to comment.  
18 And you led the Court to believe that was a 44-day period.

19 MS. MYERS: No, it was -- it was 44 days.

20 THE COURT: No, it was 74 days total.

21 MS. MYERS: No, it wasn't.

22 THE COURT: The initial 30, plus 44 given what you  
23 just said.

24 MS. MYERS: It went from 30 days --

25 THE COURT: To 44 total? So it was a 14 -day



1 extension? Which is it?

2 MS. MYERS: Correct, but that -- that left a total --

3 THE COURT: Which is correct? Let's start at the  
4 beginning.

5 What was the initial comment period?

6 MS. MYERS: 30 days.

7 THE COURT: All right.

8 MS. MYERS: And then --

9 THE COURT: Then it got extended. Correct?

10 MS. MYERS: Correct.

11 THE COURT: What number of days was it, the amount of  
12 days by which it was extended?

13 MS. MYERS: 14 --

14 THE COURT: Uh-huh.

15 MS. MYERS: -- which brings it to the 44.

16 THE COURT: Right. But that is not what you said to  
17 me.

18 MS. MYERS: That we are challenging -- we're  
19 challenging that the 44 days was insufficient.

20 THE COURT: I understand the explanation now. And my  
21 questions might have been quite different if you had said to  
22 me, There was an initial 30-day period extended by 14 days  
23 to 44.

24 You may have gotten to the same point that the 44 days  
25 was inadequate. But it got me down a path that was

1 inappropriate. I got it. I put your argument in context. It  
2 is fine. I now understand. I appreciate it. We're done.

3 MS. MYERS: I sincerely apologize for any confusion.

4 THE COURT: It's quite all right. Everybody makes  
5 mistakes, Ms. Myers.

6 Nobody is perfect, including the bench.

7 That's why there are erasers on pencils because this is  
8 a human endeavor.

9 So no offense taken.

10 Mr. Cumming.

11 MR. CUMMING: Thank you, your Honor.

12 THE COURT: No, I don't need anything from the day 1.

13 MR. CUMMING: This is day 2, your Honor.

14 THE COURT: All right.

15 Mr. Cumming, before you begin, I will make a general  
16 comment for the benefit of everybody.

17 Word choices matter. Words matter. Please choose your  
18 words carefully so that we're all on the same page with the  
19 same understanding.

20 It is critically important. I know everybody is doing  
21 the best that they can and I appreciate it. I'd rather you  
22 take an extra ten seconds and think about what you are saying.

23 Gentlemen, I am not going to compete with sidebar  
24 conversations.

25 MR. OTIS: Sorry, your Honor.

1           THE COURT: I am trying to say something for the  
2 benefit of all. Either we are paying attention or we are not  
3 paying attention.

4           MR. OTIS: Apologies.

5           THE COURT: All right. Word choices matter. Let's  
6 make sure everybody is on the same page.

7           If you are not a hundred percent sure, if you are caught  
8 up in the moment, an extra ten seconds is not going to matter.  
9 I am not holding everybody to the absolute precise second of  
10 the allotted time.

11           The more we're on the same page, the better the  
12 conversation is. So take it for what it's worth. Okay.

13           Mr. Cumming, you are up.

14           MR. CUMMING: Thank you, your Honor.

15           I will just start with the comment period and then move  
16 on. It was a 30-day comment period extended by 14 days to 44  
17 days. Federal Highway's regulations provide for a 30-day  
18 comment period.

19           I am not aware of a case and plaintiffs have not brought  
20 one to the Court's attention that has found comment period  
21 unreasonable when it exceeds that which is set out in  
22 regulation.

23           THE COURT: Is there past practice as to extensions  
24 and what seems to fall within a reasoned and reasonable  
25 parameter?

1 MR. CUMMING: I believe it is a case-by-case basis,  
2 your Honor. I am not aware.

3 THE COURT: Okay. You do not believe given the  
4 complexity and the volume of material here that an  
5 overall 44-day period was unreasonable?

6 MR. CUMMING: Sorry, your Honor. Could you repeat the  
7 question?

8 THE COURT: I said given the complexity of the  
9 material, and the novelty of this -- you know what? I am not  
10 going to misstate.

11 Melissa, would you be kind enough to read back my  
12 question.

13 (Record Read.)

14 MR. CUMMING: It was a reasonable comment period  
15 length, your Honor. It exceeded that set out in regulations.  
16 It is one day short of the regulatory length of comment period  
17 for EISs.

18 Yes, I believe it is reasonable.

19 THE COURT: Okay. So EISs get a 45-day comment  
20 period. So in this circumstance on a comparative basis, it was  
21 one day less than that.

22 MR. CUMMING: Correct.

23 THE COURT: Okay. You may proceed.

24 MR. CUMMING: Thank you.

25 If your Honor would turn to the fourth page of our slide

1 titled, Participating Agencies.

2 THE COURT: Yes.

3 So as we get there, do you agree, Mr. Cumming, that  
4 there is a differentiation between participating entities and  
5 cooperating entities?

6 MR. CUMMING: Yes.

7 THE COURT: And they have different rights and  
8 obligations under the regulatory scheme?

9 MR. CUMMING: Yes.

10 THE COURT: And that the parties that were listed on  
11 the chart -- or the number of parties that were identified by  
12 Ms. Myers on her chart were all participating entities with  
13 those higher-level rights and obligations?

14 MR. CUMMING: That is my understanding.

15 THE COURT: Okay. Very good.

16 MR. CUMMING: You are looking at the same chart,  
17 your Honor.

18 THE COURT: Okay.

19 MR. CUMMING: In a slightly different format.

20 THE COURT: Okay. Go ahead.

21 MR. CUMMING: But the material is the same.

22 One thing I want to point out on the number of  
23 participating agencies and state transportation agencies are  
24 identified. The North Jersey Transportation Planning  
25 Authority, which is overlooked a bit by plaintiffs here is --

1 my understanding is that that is the New Jersey agency  
2 responsible for administering the state's Clean Air Act --

3 THE COURT: Okay.

4 MR. CUMMING: -- state implementation plan. So the  
5 idea that there was not a New Jersey agency that was involved  
6 in air quality as a participating agency, I don't think that's  
7 accurate.

8 On the next page --

9 THE COURT: Just let me -- what was that ten seconds?  
10 You're talking which New Jersey agency deals with?

11 MR. CUMMING: The right side of the -- the right side  
12 chart, your Honor, the one, two, three, four, fifth down.

13 THE COURT: New Jersey Transportation Planning  
14 Authority.

15 MR. CUMMING: Correct.

16 THE COURT: Okay. Got it.

17 MR. CUMMING: On the next page, your Honor, there were  
18 a number of opportunities for agency coordination.

19 THE COURT: Well, what does that mean?

20 MR. CUMMING: Agencies were invited to meet with  
21 Federal Highways and project sponsors and to discuss issues  
22 about -- about the EA. So I want to --

23 THE COURT: Is that a general invitation in the form  
24 of some kind of public notice? Are we talking about specific  
25 and determination made by the FHWA to specifically invite

1 certain entities? Or both?

2 MR. CUMMING: These were the participating agencies  
3 sometimes delineated by topic area depending on the topic of  
4 conversation. So of the participating --

5 THE COURT: Of the participating agencies. So the  
6 first cut has been made, and on that first cut there were these  
7 invitations that flow?

8 MR. CUMMING: Correct.

9 THE COURT: Continue.

10 MR. CUMMING: I will note, your Honor, this is not an  
11 exhaustive list. In the record there are other meetings  
12 referenced, but this is a good overview of agency coordination  
13 at a high level.

14 THE COURT: And which slide?

15 MR. CUMMING: This is the opportunities for agency  
16 coordination.

17 THE COURT: Okay. Fine. That's what I thought.

18 MR. CUMMING: There are other -- there are other  
19 references in the record --

20 THE COURT: Okay.

21 MR. CUMMING: -- to agency coordination. On the next  
22 page, your Honor, for public participation, there were numerous  
23 early outreach virtual webinars.

24 THE COURT: Public participation as a participating  
25 entity or public -- public involvement?

1 MR. CUMMING: As a member of the public.

2 THE COURT: As a member of the public.

3 So not fitting into either category of a participating  
4 entity or a cooperating entity. This is just the public in  
5 general?

6 MR. CUMMING: Yes, your Honor.

7 THE COURT: That was done by some form of public  
8 notice posted somewhere?

9 MR. CUMMING: Yes. The webinars were advertised. I  
10 believe the advertisements were translated into, I believe,  
11 nine different languages. There was interpretation offered.  
12 There were phone dial-in options.

13 THE COURT: But these were webinars in which  
14 information was going out?

15 MR. CUMMING: Yes.

16 THE COURT: Was there any in?

17 MR. CUMMING: Yes.

18 THE COURT: Permitted?

19 MR. CUMMING: Yes. These were early outreach webinars  
20 wheres there was the opportunity, I believe, for a two-minute  
21 comment per public participants.

22 THE COURT: A New Jersey agency that was not a  
23 participating party could have involved itself in one of these  
24 virtual webinars and offered comment?

25 MR. CUMMING: I don't see what would have stopped



1     them, but I don't know the --

2             THE COURT:   No.  We don't know whether they did, but  
3     the point is there was opportunity.

4             MR. CUMMING:  I believe so.

5             THE COURT:  Whether they chose to avail themselves of  
6     it or not is a different issue.

7             MR. CUMMING:  They were publicly available.

8             THE COURT:  Okay.

9             MR. CUMMING:  I will note, your Honor, there were a  
10    number of webinars that were specifically devoted to  
11    environmental justice issues and even more than that, specific  
12    environmental justice issues relevant to geographic regions.  
13    So there were two -- three -- excuse me, New Jersey-specific  
14    environmental justice webinars that were offered on those  
15    issues specific to New Jersey.

16            On the next page, your Honor, there were hearings on the  
17    draft EA, over 1,000 viewers of those presentations.

18            I want to note, your Honor, I am discussing the public  
19    roadmap here.  I am going to come back to the agencies in a  
20    minute, but these are opportunities for the public to  
21    participate.

22            THE COURT:  Okay.

23            MR. CUMMING:  I will note at these hearings --

24            THE COURT:  Well, a nonparticipating agency could,  
25    in fact -- or even a participating agency is, in fact, a member

1 of the public. There is nothing that precludes them. Correct?

2 MR. CUMMING: There is not. For instance,  
3 Congressman Gottheimer spoke at one of the webinars -- or  
4 public hearings.

5 Yes, your Honor. It doesn't preclude you from speaking  
6 regardless of your position.

7 THE COURT: Can documents be submitted at these? Or  
8 is it just oral presentations?

9 MR. CUMMING: I believe it is just oral presentation,  
10 but I honestly don't know.

11 THE COURT: Okay. We will figure out that  
12 differentiation if need be.

13 MR. CUMMING: Now, comments received during the formal  
14 comment period, this is the opportunity to submit formal  
15 written comments. To your Honor's question, can you submit  
16 documents? Yes, this is how you do it.

17 THE COURT: Okay. So it is two separate possibilities  
18 for engagement.

19 MR. CUMMING: Yes.

20 THE COURT: One, oral presentation, like the noted  
21 hearings for webinars proceeding that, and a process for formal  
22 written comment.

23 MR. CUMMING: Yes.

24 THE COURT: Okay. Were these running simultaneously  
25 or sequentially? Do we know?

1 MR. CUMMING: These were running simultaneously.

2 THE COURT: The oral presentation period was running  
3 at the same time as the formal written comment period?

4 MR. CUMMING: Correct.

5 THE COURT: Okay.

6 MR. CUMMING: The public comment period began on  
7 August 10th and was -- 2022, and was extended to  
8 September 23, 2022. By looking back on the prior slide, the  
9 webinars were held between August 25th and August 31st.

10 THE COURT: They overlap.

11 MR. CUMMING: They did.

12 Federal Highway received almost 70,000 public input  
13 submissions, which included more than 22,000 individual  
14 comments. There were a lot of form letters that were  
15 submitted. So that's why the differential in numbers, but,  
16 still, they received over 22,000 individual comments, many  
17 included -- and they also included letters, emails, voicemails,  
18 and submissions through an electronic submission form. So  
19 numerous avenues in which to make a comment on the draft EA.

20 Those comments were all responded to in appendix 18C of  
21 the environmental assessment.

22 There is also appendix 18A, which is responses to  
23 frequently received comments, which is included in the record  
24 appendices provided to the Court, which provides detailed  
25 answers to concerns that arose frequently among multiple

1 comments.

2 THE COURT: We are about halfway through here.

3 MR. CUMMING: Your Honor, in the next page, public  
4 participation, this gets the point I was making about the  
5 difference between the participation -- public participation  
6 options of this project and what would be available under a  
7 regular EA or an EIS. This project was, essentially, the type  
8 of public participation you would get with an EIS.

9 Next page, your Honor.

10 There was specific public participation from  
11 environmental justice issues. You talked with Ms. Myers about  
12 the Environmental Justice Technical Advisory Group. I believe  
13 invitations were made. Well, on the slide, sponsors  
14 invited 37 groups to participate, 16 groups accepted the  
15 invitation.

16 THE COURT: Project sponsors meaning the MTA, not the  
17 FHWA. Correct?

18 MR. CUMMING: Correct. That's my understanding.

19 I do not know if more New Jersey agencies were invited  
20 other than the New Jersey Environmental Justice Alliance. I  
21 don't think that information is in the record.

22 THE COURT: Is it under the regulatory scheme, is it  
23 the project sponsors' responsibility to identify and do the  
24 inviting? Or is it the FHWA's because of the nature of the  
25 project, it was delegated to the MTA? Do you know?

1 MR. CUMMING: This type of engagement is not required  
2 by the regulations. This specific level of environmental  
3 justice participation is not required by the regulations.

4 THE COURT: Right. This is an outgrowth of the  
5 executive order. Right?

6 MR. CUMMING: This is an additive process. It is not  
7 prescribed by regulation.

8 THE COURT: Right. But I assume there is a practice  
9 that somebody follows.

10 MR. CUMMING: I think typically this -- typically this  
11 is a project sponsor-led process because they are the ones with  
12 the local knowledge in the area, not Federal Highways.

13 THE COURT: So it is delegated because the project  
14 sponsor has the, in essence, boots-on-the-ground local  
15 knowledge.

16 MR. CUMMING: Yes. And that is how much of  
17 Federal Highways works with state sponsors around the country.

18 THE COURT: Thank you.

19 MR. CUMMING: There was also an Environmental Justice  
20 Stakeholder Working Group. That was a self-nominated process.  
21 Individuals could ask to participate, and they were allowed to  
22 participate if they asked.

23 And as we noted yesterday, following --

24 THE COURT: In essence, people can self-nominate to be  
25 involved?

1 MR. CUMMING: Correct.

2 THE COURT: Okay. So it works both ways,  
3 self-nomination and project-sponsor invitation?

4 MR. CUMMING: Yes.

5 And following completion of the NEPA process, there is  
6 going to be an environmental justice community group that's  
7 going to meet quarterly to discuss mitigation measures.

8 THE COURT: Is there any discussion between the  
9 project sponsors and the FHWA as to the criteria utilized to  
10 create an invitation list?

11 MR. CUMMING: I am not aware of any.

12 A few points specifically on the New Jersey agency  
13 participation.

14 THE COURT: So now we are shifting back from the  
15 environmental side for which there are no regulations, to the  
16 issue of a participating entity or agency, correct, for which  
17 there is statutory and regulatory guidance?

18 MR. CUMMING: There is regulatory guidance.

19 THE COURT: Regulatory guidance.

20 MR. CUMMING: Yes, your Honor.

21 THE COURT: Okay.

22 MR. CUMMING: I believe Third Circuit in -- at the  
23 Department of -- *Delaware Department of Natural Resources and*  
24 *Environmental Control*, 685 F.3d 259, has found that public  
25 participation that was far less than provided here meets NEPA's

1 requirements.

2 THE COURT: Okay. I am just trying to understand the  
3 process.

4 MR. CUMMING: I understand, your Honor.

5 THE COURT: So talk to me about the process of  
6 identifying the, quote, Participating parties -- or  
7 participating -- here participating agencies vis-à-vis  
8 New Jersey.

9 MR. CUMMING: The record at 37042 describes, in brief,  
10 the process for narrowing down specific agencies with specific  
11 expertise.

12 THE COURT: So the agency has discretion. It  
13 exercised that discretion, and the exercise of that discretion  
14 was described in what you are referring to --

15 MR. CUMMING: Yes.

16 THE COURT: -- at this moment.

17 MR. CUMMING: I don't have the page in front of me,  
18 but there's a cite from the Tenth Circuit in our brief that  
19 notes the discretion given to agencies in making that  
20 determination.

21 THE COURT: Was the creation of the list, to the best  
22 of your knowledge, uniform with respect to New York entities  
23 identified and invited vis-à-vis New Jersey entities identified  
24 and then invited?

25 You know, it is one thing to recite the standards or

1 benchmarks. It is another thing about how they were applied  
2 and whether they were applied consistently.

3 What I'm trying to figure out is were they applied  
4 consistently?

5 MR. CUMMING: I believe they were, your Honor.

6 THE COURT: But we don't know whether that's fully  
7 explained to whatever degree may pass muster in the EA.

8 MR. CUMMING: I believe it is explained adequately in  
9 the EA.

10 THE COURT: Okay. But it is explained.

11 MR. CUMMING: Yes, your Honor.

12 THE COURT: It is addressed.

13 MR. CUMMING: Yes, Your Honor. New Jersey --

14 THE COURT: Ms. Myers, I guess the question back to  
15 you on rebuttal is: If it is not explained adequately, help me  
16 understand why.

17 MR. CUMMING: New Jersey -- and context is important,  
18 your Honor.

19 THE COURT: Yes, absolutely.

20 MR. CUMMING: New Jersey wasn't ignored. There were  
21 four meetings with New Jersey agencies, Ms. Myers talked about  
22 them.

23 At no point did any representative from New Jersey ask  
24 for other New Jersey agencies to be included. I think the  
25 reasonableness of the decision has to look also at what



1 information the agencies were presented with.

2 THE COURT: Well, like --

3 MR. CUMMING: And --

4 THE COURT: -- I have said before, if one wants a  
5 particular outcome, and they think that the record is  
6 inadequate to get to that outcome they have to help the  
7 deciding entity, whether it is the agency or me as the Court,  
8 to figure out how to get there. Right? That's the point you  
9 are making.

10 MR. CUMMING: That is exactly what the Supreme Court  
11 said in *Vermont Yankee*. You can't sandbag the agency by  
12 waiting until the end.

13 The first meeting between New Jersey agencies, there  
14 were some -- there were questions about how tolling would  
15 impact buses. The second, there was only one comment from  
16 New Jersey agencies about signage. The third, they asked no  
17 questions. The fourth, they asked about the availability of a  
18 PowerPoint and where the final EA would be posted.

19 The record does not indicate that New Jersey utilized  
20 the participation that was available to it.

21 Governor Murphy received a briefing from Secretary  
22 Buttigieg about the project. And New Jersey's comment letters  
23 were responded to in detail.

24 THE COURT: Both the -- the September letter and the  
25 June letter?

1 MR. CUMMING: Not the June letter, your Honor, and I  
2 am happy to address that.

3 THE COURT: Okay. You have about three minutes left  
4 in your time.

5 MR. CUMMING: The Court's indulgence.

6 THE COURT: No problem.

7 MR. CUMMING: The difference between the September and  
8 the June letters is explained by the  
9 regulations. 23 CFR 771.119(d) describes the public comment  
10 period for the EAs. 23 CFR 771.119(h) says, an agency may  
11 provide an EA for public review prior to issuance of a FONSI.  
12 That -- that is complemented by CEQ's regs.

13 THE COURT: Well, we are going to get into what is  
14 meant by a public availability period, but I will let you  
15 continue.

16 MR. CUMMING: Well, your Honor, I'm happy to address  
17 that.

18 THE COURT: No, no. We will get there.

19 MR. CUMMING: The regulations use different words,  
20 basic principals of statutory interpretation. If a regulation  
21 wanted to say a comment period, that's what it would have said.

22 THE COURT: Okay.

23 MR. CUMMING: CEQ regs back that up, 40  
24 CFR 1501.6(a)(2) noting an agency --

25 THE COURT: So you can't publish a reg without notice

1 and comment that in some form or fashion describes the purpose  
2 and intent of the proposed reg. And then when the final reg is  
3 published if there are comments that are received, those  
4 comments need to be responded to in some manner.

5 And so, effectively, the notice and comment period is a  
6 form of legislative history around the regulation.

7 So my question to you is: What did the agency mean and  
8 what did it intend when it created a public availability  
9 period? And what were the expectations of what that public  
10 availability period would provide for, my words, interested  
11 parties? And is it just, oh, we are going to put it on display  
12 and nothing more?

13 So help me out here, Mr. Cumming.

14 A public availability period cannot be a nullity, and it  
15 can't create illusory rights. So help me understand what is  
16 the purpose of a public availability period.

17 MR. CUMMING: First --

18 THE COURT: I will accept that the regs say you can't  
19 do comments during the public availability period. Whether  
20 that's right or wrong is a different issue. I will accept your  
21 statement.

22 What is the expectation that was created around the  
23 creation of a public availability period?

24 MR. CUMMING: One, it, obviously, lets the public know  
25 the agency has or is close to reaching a final decision.

1 THE COURT: Right.

2 MR. CUMMING: Two, it lets the public review the draft  
3 FONSI.

4 THE COURT: Yes.

5 MR. CUMMING: The public had the opportunity to, if  
6 there were critical things missed in the FONSI, bring that to  
7 the attention of the agency.

8 THE COURT: How are they supposed to do that?

9 MR. CUMMING: They submit written comments, like  
10 New Jersey's.

11 Though, I -- that's why I think it is --

12 THE COURT: So written comments are permitted during  
13 the public availability period?

14 MR. CUMMING: It is an option, but I want to  
15 distinguish between comments on the FONSI and comments on the  
16 draft EA. Those are different documents out at different  
17 times. So to the extent that New Jersey is commenting on  
18 the --

19 THE COURT: But isn't the FONSI derivative of the  
20 final EA?

21 MR. CUMMING: The findings of no significance  
22 certainly are derivative, but there --

23 THE COURT: So if there is a glaring error in the  
24 FONSI with respect to certain findings, isn't that glaring  
25 error also in the final EA? And isn't that if the comments

1 made as to the -- to the FONSI as to the glaring error, and the  
2 glaring error emanates from the final EA, isn't the comment  
3 period applicable to both?

4 MR. CUMMING: It could be, your Honor. That question  
5 isn't before --

6 THE COURT: Well, but that's not how the law works.  
7 Right?

8 You know, then it makes it a very subjective process in  
9 which, in some instances, it is okay to accept it and act on  
10 it. And in other instances, it is not. That is not the intent  
11 of administrative law.

12 Administrative law is intended to create certainty and  
13 predictability for the participants in similar situations.

14 You are saying to me, on the one hand, it is okay. And  
15 on the other hand, it is not okay. That is subjective. That,  
16 arguably, is arbitrary and capricious. That is, arguably,  
17 abuse of discretion.

18 Help me understand why it is okay in one circumstance  
19 and not in another.

20 MR. CUMMING: I do not agree it is arbitrary for the  
21 agency to provide the required comment period on the draft EA,  
22 as Federal Highway did here, and to provide the option for the  
23 public to submit comments on the draft FONSI even though it was  
24 not required.

25 THE COURT: So when the public availability period

1 came, was it clear in the notice as to what interested members  
2 of the public could and could not do?

3 MR. CUMMING: I believe it was. And I'll -- I am  
4 happy to give you that cite during rebuttal.

5 THE COURT: Okay. So the agency made the roadmap for  
6 what was permissible in terms of comments known to the public?

7 MR. CUMMING: Yes.

8 THE COURT: And in your words -- Ms. Peltz is nodding  
9 her head up and down. So, obviously, your surmise at least  
10 comports with the understanding of your colleague.

11 MR. CUMMING: Those -- those notice documents are in  
12 the record, your Honor.

13 THE COURT: Okay. And those notice documents made it  
14 clear that if there were any concerns with respect to the  
15 FONSI, that was within bounds of comment -- written comments?

16 MR. CUMMING: We will get you the specific language,  
17 your Honor, but that is my understanding.

18 THE COURT: And it was clear from that guidance and  
19 direction that the comments were limited to the draft FONSI and  
20 in no way, shape, or form, could implicate the EA unless, in my  
21 words, there was some significant interconnectedness in which  
22 the language from the draft FONSI was ostensibly taken from  
23 the EA?

24 MR. CUMMING: Notices were clear. It was not  
25 reopening the comment period --

1 THE COURT: Okay.

2 MR. CUMMING: -- in the draft EA.

3 THE COURT: All right. So let's talk about the second  
4 letter. Right?

5 How does the second letter relate to this process, if at  
6 all?

7 MR. CUMMING: The record reflects the agency reviewed  
8 that letter and the other letters, and found it did not --

9 THE COURT: And the other letters that came in during  
10 the public availability period?

11 MR. CUMMING: It's my understanding.

12 THE COURT: Okay. So the second letter is within  
13 bounds in terms of being properly filed within the period?

14 MR. CUMMING: It was submitted during the public  
15 availability period, yes.

16 THE COURT: Okay. So that is not an issue.

17 The issue is that the agency said that it reviewed the  
18 contents of the letter, and it did whatever it did. It was not  
19 going to make any changes on the basis of the content of the  
20 Governor's second letter?

21 MR. CUMMING: No.

22 THE COURT: Okay.

23 MR. CUMMING: It was not going to because the content  
24 is the state's lawsuit today, which we disagree with.

25 THE COURT: Okay.

1 MR. CUMMING: That's why I'm standing here.

2 THE COURT: All right.

3 What else?

4 MR. CUMMING: Unless the Court has further questions.

5 THE COURT: Hold on.

6 So, Mr. Cumming, I want to go back to a statement you  
7 just made.

8 The Governor's second letter is, in essence, the lawsuit  
9 today. You made that comment. Correct?

10 MR. CUMMING: I did.

11 THE COURT: If that is, in fact, the case, then how  
12 can any of the issues that are being raised today, which were  
13 raised in that letter, be waived? FHWA is on notice. Right?  
14 How is there a waiver?

15 MR. CUMMING: The waiver would -- would go to issues  
16 that could have been addressed between the draft EA and the  
17 final EA, I believe. And I -- I will defer to MTA on the  
18 waiver with -- everything else with respect to environmental  
19 justice, where we have argued that there was no reference in  
20 the state's September letter that would have allowed Federal  
21 Highways to target -- to address the state's concerns about  
22 environmental justice.

23 I believe that's the only issue for which we are arguing  
24 waiver --

25 THE COURT: Okay.



1 MR. CUMMING: -- in our briefs.

2 THE COURT: We will figure it out when we look at the  
3 record, and we will go from there. I appreciate it.

4 MR. CUMMING: Thank you.

5 THE COURT: Mr. Chertok, you are up. You  
6 have 25 minutes. And if you want to start with the last point,  
7 I will be happy to hear what you have to say. If you have  
8 other plans for how you want to proceed, that's fine, too.

9 MR. CHERTOK: Well, I will try to address --  
10 (Reporter clarification.)

11 MR. CHERTOK: I will try to address some of  
12 your Honor's questions and -- and comments. I am not going to  
13 repeat Mr. Cumming's presentation.

14 There were remarkably expansive opportunities for the  
15 public and New Jersey or other state agencies to consult in the  
16 process. And I think it is very important to distinguish  
17 between this notion of participating agencies and other  
18 agencies, who even if they are not denominated as  
19 participating, can still consult and comment and add during the  
20 process.

21 So what you --

22 THE COURT: All right. Participating agencies have  
23 some elevated status, but it doesn't preclude anybody who  
24 doesn't have that status from engaging in the process, given  
25 the public opportunity?

1 MR. CHERTOK: Exactly. So that -- that's the first  
2 point here.

3 The second point is that there were multiple outreach  
4 sessions of two types, as Mr. Cumming indicated. One,  
5 environmental justice groups. And secondly, various state and  
6 other agencies.

7 Now, that -- the -- New Jersey has made -- has talked  
8 about the fact there is a disparity between New York and  
9 New Jersey entities. Let's talk about that.

10 I do recall Mr. Mastro describing extensive work being  
11 done in New York City. Now, it is not really extensive, as  
12 Ms. Knauer explained, but it is on telephone poles and it is on  
13 wires.

14 And that requires the input from New York City officials  
15 because that work will only take place in New York City; ergo,  
16 you would expect to have city agencies invited to participate  
17 because of their knowledge of New York City. That's --

18 THE COURT: I think Mr. Mastro and the plaintiffs  
19 would probably concede that point.

20 MR. CHERTOK: Well, I will be glad to hear it. I am  
21 waiting.

22 THE COURT: Well, he will have his -- Ms. Myers will  
23 have an opportunity.

24 I think what we are going to do is we are going to hear  
25 you, then we will take a lunch break. And like we did

1 yesterday --

2 MR. CHERTOK: Sure.

3 THE COURT: -- do rebuttal after lunch.

4 MR. CHERTOK: Right. And that -- so that's one major  
5 point.

6 Two is, it is kind of remarkable here. You have  
7 New Jersey transportation agencies being specifically invited.  
8 And they, apparently, have no desire to comment. They have no  
9 desire to pursue the matter. They just ask a few questions and  
10 then retire.

11 The governor meets with the secretary and nothing  
12 further happens. There is a meeting just before the draft EA  
13 is released, which gives a preview of what's coming. That is  
14 inadequate.

15 Now, the real fact is here --

16 THE COURT: That meeting is inadequate --

17 MR. CHERTOK: For New Jersey.

18 THE COURT: -- in plaintiff's view. In plaintiff's  
19 view.

20 MR. CHERTOK: Right. Even though it is designed to  
21 give everyone a heads-up on what is coming down the pike on the  
22 following week.

23 But let's go back to all of the outreach and all of the  
24 opportunities.

25 We have a state that has considerable resources.

1 Presumably the executive office knows that it has agencies  
2 called Department of Health and Department of Environmental  
3 Protection, and presumably even the transportation agencies  
4 know of their sister agencies.

5 THE COURT: So the point I think you are getting to,  
6 Mr. Chertok, is notice to the executive -- to one part of the  
7 executive in New Jersey would suffice the notice to all of the  
8 relevant agencies?

9 MR. CHERTOK: That is only one aspect of it.

10 But the point is that New Jersey was certainly aware of  
11 this project. And did any of those other agencies that  
12 presumably -- that were not specifically invited, did they pick  
13 up a phone and call somebody at FHWA. Or --

14 THE COURT: So using Mr. Mastro's words, obviousness.

15 MR. CHERTOK: Yes. But it works in the other way  
16 here. Yes. It is perfectly obvious that New Jersey could have  
17 participated had they chosen to do so. What New Jersey chose  
18 to do is not participate. And then put in the letter at  
19 the 11th hour to try to preserve their claims for the lawsuit.  
20 That's really what's happened here. Because if you go back and  
21 look at their first letter on the draft EA, it is remarkable  
22 for what it doesn't say.

23 It doesn't raise issues about the methodology used in  
24 the traffic study. It just mentions that, don't like what was  
25 done. It doesn't talk about the regional analysis for traffic,

1 the highway analysis, the intersection analysis, all of which  
2 come up in the litigation.

3 It doesn't talk about the air quality methodology for  
4 regional impacts, for hotspots, for intersections, et cetera,  
5 for highways. It doesn't talk about the methodology used to  
6 identify EJ populations and EJ communities. All of that and  
7 much other information was in the draft EA. It doesn't even  
8 raise a single -- it has a single passing comment in that -- in  
9 those comment letters from the governor and the agencies about  
10 you could probably do this by another way, by placards -- by  
11 eliminating New York City government parking spaces --

12 THE COURT: The first letter, you're talking about the  
13 first letter in the --

14 MR. CHERTOK: The first letter, I'm only talking about  
15 the first letter.

16 THE COURT: -- the representation from you that that  
17 letter was inadequate to put the FHWA on notice as to the  
18 breadth of issues of concern to the plaintiff.

19 MR. CHERTOK: Absolutely. With a carveout that Mr.  
20 Cumming acknowledged and I agree with, that the full blown --  
21 the full mitigation study was not there. So that was  
22 different. But other than that --

23 THE COURT: That is the lion's share of the difference  
24 between the draft and the final EA. Correct?

25 MR. CHERTOK: That's right. And that was done and if

1 you recall that Mr. Mastro specifically said -- well, he didn't  
2 say we raised it. He said EPA raised it.

3 THE COURT: Right. And the Court engaged him in a  
4 colloquy about incorporation by reference. I am not sure I  
5 have gotten a response to whether there was, in fact, a written  
6 document from the State of New Jersey that specifically  
7 incorporated it by reference. But I do have a case law cite  
8 that says what was raised by one effectively is raised by all.

9 MR. CHERTOK: But what's critical to remember is that  
10 EPA --

11 THE COURT: Excuse me one second.

12 MR. CHERTOK: -- signed off.

13 THE COURT: Excuse me one second.

14 MR. CHERTOK: Pardon me, your Honor?

15 THE COURT: Excuse me one second.

16 MR. CHERTOK: Sure.

17 THE COURT: Thank you for nodding your head up and  
18 down that I have a reasonable memory, Mr. Mastro.

19 MR. MASTRO: Thank you, your Honor.

20 MR. CHERTOK: You notice I didn't argue with that  
21 either.

22 THE COURT: Well, I understand, Mr. Chertok.

23 And, you know, that's because you want a lesson in tying  
24 a bow tie after the litigation is all over.

25 MR. CHERTOK: You know, it will elongate my marriage.

1           So but -- but to get back to that point, that's right.  
2       There was -- I don't recall any letter incorporating EPA, but  
3       the main point was that EPA approved of the expanded analysis.  
4       And that the --

5           THE COURT: Well, they raised questions and concerns  
6       initially and then after that got a response, they seem to  
7       indicate that that response responded to their concerns.

8           MR. CHERTOK: Exactly, your Honor, which would suggest  
9       that if New Jersey is relying upon the concerns raised by EPA,  
10      then New Jersey's concerns were equally addressed in the final  
11      EA.

12          THE COURT: You are asking for a -- an inference to be  
13      drawn in that.

14          MR. CHERTOK: Fair enough, your Honor.

15          But certainly there is a fairly good logic there that  
16      could be applied.

17          Now, a couple of other issues --

18          THE COURT: We will accept that that's --

19          MR. CHERTOK: Yeah.

20          THE COURT: -- an argument, a reasonable argument.

21          MR. CHERTOK: So a couple of other points we want to  
22      make here is that the -- this public availability period, which  
23      is really not unusual for environmental documents and the --  
24      the NEPA process or the state counterparts to that where  
25      there's a draft document. It's put out for public comment.

1 The document is then modified as appropriate and responses to  
2 comments are prepared. And then the revised version is put out  
3 for the public information. Not for comment period.

4 Otherwise, your Honor, this process never ends.

5 So here, for example, you have the draft EA was issued  
6 in the spring of 2022. Summer of 2022, pardon me.

7 And the -- the letter from New Jersey, it was September  
8 of 2022. The final EA came out the following -- in May, I  
9 believe. And we have a June letter. Do we restart this  
10 process? Or is there some -- some concept of finality which is  
11 what the comment period is designed to do. Achieve some degree  
12 of finality. And the --

13 THE COURT: So the argument from the government and  
14 from you is that the draft EA is published. It has a period of  
15 time for which there is comment. That time has run. And you  
16 then get the final EA. And so any comments submitted after in  
17 your view, is beyond the period of time provided for by comment  
18 and finality should attach to the final EA absent something  
19 that is so glaring that somehow or another there should be a  
20 process to bring that to the attention of the Federal Highway  
21 Administration for corrections.

22 MR. CHERTOK: But there is a process. The -- as  
23 Mr. Cumming explained, the FHWA --

24 THE COURT: Okay.

25 MR. CHERTOK: -- reviewed those letters.



1 THE COURT: Right.

2 MR. CHERTOK: And if they had believed that there was  
3 something in those letters that raised a fundamental flaw --

4 THE COURT: In the EA. In the EA.

5 MR. CHERTOK: -- in the process. EA or FONSI, that  
6 would have been subject to address.

7 THE COURT: So there is this public availability  
8 period. And if there is -- so the benchmark is if there is  
9 something significant or glaring, theoretically that can be  
10 brought to the attention of the FHWA during the public  
11 availability period, but the primary purpose of the public  
12 availability period is for comments on the draft FONSI.

13 MR. CHERTOK: Yes. But I also think the other primary  
14 purpose of the public availability is public information. A  
15 fundamental premise underlying NEPA is to have the public  
16 informed of what is going on and what is happening. And that  
17 is why you have public availability.

18 So the agency is not obligated to consider anything.

19 THE COURT: So where do I draw the line on finality  
20 with respect to the EA?

21 MR. CHERTOK: On the issuance of the -- the end of the  
22 comment period on the draft EA is where finality ends.  
23 Otherwise, this process goes on indefinitely.

24 THE COURT: Except, except during the public  
25 availability -- there is an exception to that in the public

1 availability period if, in your words, there is something  
2 glaring.

3 MR. CHERTOK: The agencies have the discretion --

4 THE COURT: Discretion.

5 MR. CHERTOK: -- but not the obligation.

6 THE COURT: Obligation. Got it.

7 MR. CHERTOK: There is a difference.

8 THE COURT: Yes. Got it.

9 MR. CHERTOK: And --

10 THE COURT: The obligation, though, runs to the  
11 comment period on the FONSI or not?

12 MR. CHERTOK: On the EA.

13 THE COURT: On -- no. The obligation ends -- I got  
14 it.

15 The public availability period ostensibly is serving  
16 three purposes, or two purposes.

17 It is providing notice to the public as to the final EA,  
18 and it is providing an opportunity for comment on the draft  
19 FONSI that is predicated on the final EA.

20 MR. CHERTOK: There is no preclusion against  
21 commenting, but it's not a comment period as it is on the draft  
22 EA.

23 THE COURT: I am not so sure that's what Mr. Cumming  
24 said in response to my questions.

25 MR. CHERTOK: Well, I think -- stated that there's a

1 preclusion --

2 THE COURT: I think he said to that that there's a set  
3 of guidance, right, that'll -- that is issued that allows for  
4 comment during the 30-day window of public availability on the  
5 draft FONSI.

6 MR. CHERTOK: I think -- well, we will settle this  
7 over lunch, but we'll -- and try to give you a --

8 THE COURT: A clean answer. Okay. Continue.

9 MR. CHERTOK: But there are cases, your Honor, that  
10 indicate that comments submitted after a comment period and  
11 during an availability period do not preserve issues. The  
12 *Earlbaum case v. -- Earlbaum v. New Jersey DEP. Slockish v.*  
13 *FHWA, S-l-o-c-k-i-s-h.* And the *Village of Logan v. Department*  
14 *of Interior.* I will give you the cites after lunch,  
15 your Honor.

16 THE COURT: That's fine.

17 Are they Fed Supp cites or are they Fed cites?

18 MR. CHERTOK: They are all -- all Westlaw.

19 THE COURT: Okay. But are they circuit or District  
20 Court opinions?

21 MR. CHERTOK: They are district. All district courts.

22 THE COURT: Okay. That's fine.

23 MR. CHERTOK: In addition there was a --

24 THE COURT: Well, one last question. Are any of those  
25 circumstances similar to -- I won't call it identical -- are

1 they similar to the circumstances we have here? Or are there  
2 some distinctions.

3 MR. CHERTOK: There were comments raised in the  
4 availability period --

5 THE COURT: Availability period.

6 MR. CHERTOK: -- and the question was whether they  
7 were preserved --

8 THE COURT: Or not. Okay.

9 MR. CHERTOK: -- for litigation.

10 THE COURT: Good. Thank you.

11 MR. CHERTOK: Sure. There was also discussion about  
12 the -- the time frame and the -- what's reasonable. And just  
13 to be clear, there was initially a 30-day comment period on the  
14 draft EA that was extended to 44 days upon the request of  
15 New Jersey and others. I don't -- I don't think that's  
16 disputed.

17 THE COURT: Well --

18 MR. CHERTOK: And then the dispute is whether or not  
19 there should be a longer time. I think --

20 THE COURT: Right.

21 MR. CHERTOK: -- New Jersey and --

22 THE COURT: It is not disputed once we got it  
23 clarified as when to what was going on.

24 MR. CHERTOK: In any event, since I am familiar with  
25 that, I wasn't that confused, luckily, but the main point is

1 that what they are saying is that it should be a nine-month  
2 period, I believe, was suggested.

3 THE COURT: Well, no. I asked what is the benchmark?  
4 So if 44 days is not enough how far back do we go? I posited  
5 some suggestions. Is it 45 days? Is it something else? And  
6 then I said, Is it 125 days, to which Ms. Myers responded that  
7 would be reasonable or words to that effect.

8 MR. CHERTOK: Okay.

9 THE COURT: So it is not nine months. It was about a  
10 four-month period.

11 MR. CHERTOK: I am pleased to hear that it was shorter  
12 and somewhat more reasonable, but there is a case that  
13 addresses the issue.

14 It was Court of Appeals decision out of the Ninth  
15 Circuit that reversed the *Kootenai Tribe* case that was cited in  
16 a New Jersey brief for the fact that there was only 12 days  
17 allowed for public review. There were no responses made to the  
18 comments on the draft EA, et cetera.

19 And the Ninth Circuit reversed and indicated, basically,  
20 that there is no viable challenge to a time frame as long as it  
21 meets the minimum time frame. And in that case --

22 THE COURT: Yes. But there is a period of time in  
23 which whatever the minimum is, it is the same question in  
24 reverse. What is too short a period? Where do you draw the  
25 line? Is it eight days? Is it 12 days?

1 MR. CHERTOK: The regulations have drawn the line at a  
2 minimum of 30 days.

3 THE COURT: Okay.

4 MR. CHERTOK: So there is a line.

5 THE COURT: There is a line that's been drawn.

6 MR. CHERTOK: What this case said, which was relating  
7 to the EIS, says the time frame is 45 days, that the extension  
8 of the time frame was slightly over 50 percent and that was  
9 perfectly appropriate and reasonable.

10 Here, the extension was just slightly under 50 percent.  
11 So, by logic, that extension was a reasonable extension.

12 I do note that there were 70,000 comments, if I recall,  
13 but to be fair, I think 50,000 were form letters. So there are  
14 perhaps 20,000 comments. So 20,000 commenters were able to put  
15 in meaningful and substantive comments in those 44 days but  
16 New Jersey, with its vast resources and multiple agencies, was  
17 unable to put in comments that addressed the merits of the  
18 claim that they are raising today. That seems a little  
19 unusual.

20 THE COURT: So Mr. Chertok, if you were sitting in  
21 Mr. Mastro and Ms. Myers' chair, would their argument be  
22 unreasonable to you?

23 MR. CHERTOK: The argument that they --

24 THE COURT: That 44 days was inadequate.

25 MR. CHERTOK: Yes. I have more years in the EIS world

1 than Ms. Knauer, but I will not state how many, but there are  
2 frequently shorter time frames for more extensive and more  
3 complicated documents.

4 It is the world of NEPA in which there's pressure to  
5 move forward, whether a project is approved or denied, and not  
6 have endless processes of public review, comment, revision,  
7 comment, review, revision. Because as I mentioned earlier,  
8 delay kills projects.

9 That's what these regulations and that's what these --  
10 the Courts are trying to avoid.

11 We need to keep this within realm. It eventually needs  
12 to end.

13 And here what you have is, basically, claims being made  
14 at the 11th hour, at the end of the public availability period,  
15 which are designed to allow New Jersey to raise claims they  
16 could have raised before and did not.

17 THE COURT: So let's assume they did raise them at  
18 the 11th hour.

19 What if they raised them at the eighth hour?

20 MR. CHERTOK: If they had raised them before the -- or  
21 during the comment period, then every one of those comments  
22 would have been addressed, but they did not raise them, and it  
23 is impossible for FHWA and the project sponsors to respond to  
24 comments not raised. That's the purpose of the comment period,  
25 to alert the agency. So they rely on EPA's comments. Those

1 comments were specifically addressed. They were responded to.  
2 And EPA was satisfied.

3 THE COURT: Continue.

4 MR. CHERTOK: That did not happen.

5 A couple of minor things, the only meetings that  
6 occurred after the draft EA was issued were with environmental  
7 justice groups. There were no private meetings with New York  
8 agencies. They were only with the environmental justice  
9 groups.

10 While we are speaking of environmental justice groups,  
11 if New Jersey believed that other environmental justice groups  
12 should have been notified, they could have informed MTA -- or  
13 the project sponsors, rather, or the FHWA. They did not.

14 If any of the other groups in New Jersey believed they  
15 should participate, they could have requested that.  
16 All 27 persons or entities that requested to participate in the  
17 working group are members. So there was no close-down or  
18 shut-out of any type of public involvement or public  
19 participation.

20 The -- I am not really -- sometimes I am not clear on  
21 New Jersey's claim because sometimes it is the public, which I  
22 don't think was actually raised, insufficient public outreach,  
23 or whether it is only related to New Jersey agencies. They've  
24 conceded that transportation agencies participated, so I  
25 believe it looks like it is narrowed down to DEP and DOH,



1 agencies that --

2 THE COURT: I think we made that clear in the colloquy  
3 with Ms. Myers.

4 MR. CHERTOK: I am just refreshing my recollection  
5 because the diligent effort regulation that was quoted refers  
6 only to public participation, not to agencies.

7 Actually, New Jersey never raised the issue of the  
8 criteria for identifying participating agencies, but I think we  
9 addressed that more than enough, your Honor.

10 Overall -- and it is clear, obviously, that neither  
11 DEP -- New Jersey DEP nor New Jersey DOH commented. I suspect  
12 if they were asked if they ever heard of this project during  
13 that period prior to the end of the comment period on a draft  
14 EA, their answer would be in the affirmative, but, of course,  
15 since they didn't comment, there was no basis to ask that  
16 question.

17 The long and short of this, your Honor, is that  
18 New Jersey consciously chose not to participate actively,  
19 whether as a participating agency or agencies or consultants or  
20 commenting agencies. They did not participate in this process.  
21 That was a New Jersey decision. They can't now shift it -- the  
22 burden -- to FHWA and the project sponsors when they clearly  
23 had no interest in partaking in the process.

24 I think the reason for that is clear in their reply  
25 brief on page 39. It says, and I am quoting, With MTA at the

1 wheel, New Jersey did not and could not reach any agreement  
2 with FHWA to implement the project because as MTA and FHWA  
3 assert multiple times, this project is being implemented in  
4 New York by statute and the legislature did not provide for  
5 New Jersey's participation.

6 That is a nonsensical statement because that legislation  
7 in no way precludes New Jersey from participating. That is  
8 just a hollow excuse for their failure to participate in the  
9 NEPA process and raise claims that they tell this Court are  
10 critical, but they couldn't raise in the administrative  
11 process.

12 Thank you, your Honor, unless you have any questions, of  
13 course.

14 THE COURT: No. I think we will hold questions until  
15 after lunch. We will give you a couple of minutes to finish up  
16 the affirmative presentation with questions from the Court.

17 MR. CHERTOK: Thank you.

18 THE COURT: We are at approximately 1:15. We are  
19 supposed to be beginning the next session right about now.

20 You all tell me.

21 Can you do what you need to do in a half hour, and we  
22 can be back in at 1:45, 1:50?

23 Fine. We will see you then.

24 (Lunch recess taken at 1:18 p.m.)

25 AFTERNOON SESSION

1 (In open court at 1:49 p.m.)

2 THE COURT: Have a seat, folks.

3 If they are late, they are late. It is their problem.

4 Mr. Chertok, you are up. I am going to give you five  
5 more minutes on affirmative presentation, and then I am going  
6 to, perhaps, ask you a question or two.

7 We are at 1:50, as I had suggested that's when we might  
8 start.

9 Mr. Chertok, you are on the clock for five minutes.

10 You may begin.

11 MR. CHERTOK: Thank you. I'm going to be brief.

12 I just want to do one thing, which is -- other than  
13 answer any questions, of course, and figure out how --

14 THE COURT: I am glad you are able to continue to  
15 laugh, Mr. Chertok, after almost two days. It is a good thing.

16 MR. CHERTOK: The June letter, the June 2023 letter --

17 THE COURT: Yes.

18 MR. CHERTOK: -- New Jersey has said it should count.

19 It should preserve their claims, et cetera, et cetera.  
20 So let's look at the topics that are the subject of that  
21 letter. I'm going to take the letter that starts on page 40844  
22 of the record. I'm just going to look -- read from their  
23 topics.

24 First is the final EA is the result of a failed process,  
25 and New Jersey said they have a strong interest in

1 participating. Nothing new.

2 Second, that the project scoping overlooked the unique  
3 characteristics of the Manhattan CBD. That certainly could  
4 have been a comment on the draft EA because the Manhattan CBD  
5 didn't change much in the interim between the draft EA and the  
6 final EA.

7 Then they say FHWA and MTA didn't conduct adequate  
8 outreach.

9 Once again, that certainly could have been raised and  
10 was obliquely raised on the comments on the draft EA.

11 The next is the project's purpose and needs are too  
12 narrow.

13 THE COURT: Mr. Chertok, can you please stop? There's  
14 a problem with the microphone.

15 MR. CHERTOK: Where did we leave off?

16 THE COURT: I think you are making your third point, I  
17 believe.

18 MR. CHERTOK: I think the point was the unique scope  
19 of the CBD, and my point was that --

20 THE COURT: No. It was the point before that. You  
21 had not used the phrase, unique scope of the CBD.

22 MR. CHERTOK: The scoping of the project overlooked  
23 the unique characteristics of the CBD, and my point was that  
24 the CBD didn't change between the draft and final EA preventing  
25 a comment in timely fashion on that issue.

1           The next is the FHWA and MTA didn't conduct adequate  
2 outreach, which was an oblique comment made earlier, but,  
3 certainly, if they didn't allegedly have sufficient outreach  
4 and that was their claim, they could have raised that in  
5 comments on the draft in more detail.

6           Next is the comment that the project's purpose and need  
7 are too narrowly defined. The purpose and need was clearly set  
8 forth in the draft EA.

9           The next is several comments on the alleged inadequacies  
10 in alternatives. The alternatives were fully set out in the  
11 EA.

12           Next is the EA didn't account for New Jersey  
13 Transportation network and commuters, including revenue impacts  
14 to New Jersey's agencies.

15           THE COURT: I know it is not your letter, Mr. Chertok.  
16 I don't know what that means.

17           Is there a sentence or two there that explains that to  
18 me?

19           MR. CHERTOK: Yes.

20           THE COURT: I mean, I know what the words mean, but  
21 this is the first time that's been mentioned in a day and a  
22 half. I am not quite sure I understand what that means.

23           MR. CHERTOK: The assertion is that, basically, there  
24 will be a greater number of commuters using New Jersey Transit  
25 and will cost the state money to accommodate them. Not a claim

1 raised in this litigation.

2 The next is impacts on the New Jersey DOT, and that  
3 includes the affects on EJ communities and the mapping process,  
4 which, of course, New Jersey could have raised in the draft  
5 EI -- EA, the comments about census tracts and the mapping,  
6 et cetera, that were raised.

7 And that the rest of the comments relate to air quality  
8 impacts as a result of the diversion and the air quality  
9 assessment was in the draft EA.

10 THE COURT: So if -- I would summarize what you said  
11 to me for the last three or four minutes.

12 One might characterize -- I am trying -- I am going to  
13 potentially put words in your mouth. You tell me whether you  
14 agree.

15 You would be characterizing the letter as raising issues  
16 which should have been raised with respect to the draft EA  
17 because the only thing of significance that changed between the  
18 draft EA and the final EA was the issues related to mitigation.

19 MR. CHERTOK: Exactly with one slight caveat. I would  
20 say not only should have been raised, but could have been  
21 raised.

22 But other than that, I concur.

23 THE COURT: They had the opportunity to do so and in  
24 your view, did not in that appropriate time period.

25 MR. CHERTOK: Correct.

1 THE COURT: Okay. All right.

2 MR. CHERTOK: Did you have any questions for me,  
3 your Honor?

4 THE COURT: I have to look at my notes.

5 MR. CHERTOK: Okay.

6 THE COURT: And I picked up the wrong piece of paper  
7 perhaps.

8 (An off-the-record discussion was held.)

9 THE COURT: Mr. Chertok, you made reference to, I  
10 believe, three or four cases about preservation of claims?

11 MR. CHERTOK: Correct, your Honor.

12 THE COURT: All right. So Mr. Chertok, did those  
13 cases involve circumstances where comments were raised during  
14 the public availability period and the Courts then said because  
15 of that, they were not preserved?

16 MR. CHERTOK: No, those were comments that were raised  
17 after the expiration of the comment period on the draft  
18 document.

19 THE COURT: No, but that's not the question I asked.

20 MR. CHERTOK: No, I am responding that they are not  
21 exactly the same.

22 THE COURT: Oh, okay.

23 MR. CHERTOK: That -- I'm just trying to clarify that.

24 But in a way, if the Courts -- if the Courts would not  
25 accept comments that were submitted late, but before the final

1 document had not been issued, and there was still an  
2 opportunity for the agency to address the comments, it is even  
3 worse that the comments came in after the final document was  
4 issued for the public.

5 THE COURT: Okay.

6 MR. CHERTOK: So those cases support the notion that  
7 the comments should have been in a timely fashion.

8 THE COURT: If comments are made to the agency  
9 reviewing, in this case, FHWA, and were responded to by the  
10 agency, does the fact that the agency considered and responded  
11 to them override the concept of the issues raised in those  
12 comments not being preserved?

13 In other words, if the agency -- if the letter is in and  
14 the agency chooses to address them, does that override the fact  
15 the claim that those issues were not preserved?

16 MR. CHERTOK: I am going to -- I am going to have to  
17 ask you a question, your Honor, with all deference. When you  
18 say the letter, which are you referring to?

19 THE COURT: No -- let's -- it's the three cases.

20 MR. CHERTOK: Okay. Okay.

21 THE COURT: If you take the three cases --

22 MR. CHERTOK: Okay.

23 THE COURT: Right, and comments are responded to by  
24 the agency --

25 MR. CHERTOK: If the agency --



1 THE COURT: -- responds, does that get rid of the --  
2 the waive/not preserved?

3 MR. CHERTOK: So, your Honor, I don't recall what  
4 happened in each of those cases.

5 But the Court's made it clear the agency is not  
6 obligated to consider those comments.

7 THE COURT: Right. Not obligated, but if they choose  
8 to do so, then that eliminates part of the problem.

9 MR. CHERTOK: Yes. But the fact that they chose to do  
10 so, it's -- you can't -- I think you can't construct that into  
11 an argument, that if they did so in their discretion because  
12 they thought it was important, suddenly then everything  
13 becomes, you know, kosher --

14 THE COURT: I understand.

15 MR. CHERTOK: -- so to speak. Okay.

16 THE COURT: Bottom line, are you arguing that the  
17 June 12th letter comments were waived?

18 MR. CHERTOK: Yes. Except for comments on the new  
19 material in the final EA on --

20 THE COURT: So anything, based on our colloquy --

21 MR. CHERTOK: Yes.

22 THE COURT: -- anything back before the new material,  
23 in your view, is out; anything that deals with new material is  
24 in?

25 MR. CHERTOK: Correct.

1 THE COURT: Got it. Thank you.

2 MR. CHERTOK: Thank you, your Honor.

3 THE COURT: Ms. Myers.

4 MS. MYERS: Thank you, your Honor.

5 THE COURT: So we're into rebuttal.

6 MS. MYERS: Yes, ten minutes.

7 THE COURT: Ten minutes.

8 MS. MYERS: Yeah.

9 THE COURT: Good. You are on the clock.

10 MS. MYERS: Okay. I would like to start with the  
11 notice of availability that was published for that comment  
12 period, May 12, 2023 to June 12, 2023. And --

13 THE COURT: We're talking about the public  
14 availability period.

15 MS. MYERS: Correct. And this is at DOT\_0036142.

16 THE COURT: Okay.

17 MS. MYERS: And it states, quote, The official 30-day  
18 public availability period for the final EA and draft FONSI for  
19 the project will begin on May 12, 2023, and will end on  
20 June 12, 2023.

21 THE COURT: Do me a favor, read that again, please.

22 MS. MYERS: Sure.

23 The official 30-day public availability period for the  
24 final EA and the draft FONSI for the project will begin on  
25 May 12, 2023, and will end on June 12, 2023.

1 THE COURT: Okay. Good.

2 MS. MYERS: Nowhere in this notice does it say that if  
3 you submit a letter during this period, the agency reserves its  
4 discretion on whether or not to consider it, and then also  
5 reserve its discretion on considering it and then deciding that  
6 you still waived your arguments in --

7 THE COURT: Okay. Ms. Myers.

8 MS. MYERS: -- the notice.

9 THE COURT: Mr. Cumming got up here, and in response  
10 to my questions, indicated that there was guidance, direction,  
11 in the notice about what could or could not be commented on and  
12 how. That's a quick summary of what I believe we discussed in  
13 the colloquy.

14 So my question to you is: You read me the document.  
15 You said to me publicly available from date X to date Y. Is  
16 there anything else that's included in that notice that you  
17 take issue with or supports your claim with respect to what  
18 could and could not be done during that 30-day period?

19 MS. MYERS: Our claim is primarily based on what's not  
20 listed here.

21 THE COURT: Okay. So tell me what is listed so I can  
22 understand how to ask you a question about what's not listed.

23 MS. MYERS: Sure. So it starts off by saying notice  
24 of availability --

25 THE COURT: Right.

1 MS. MYERS: -- of the final EA and draft. FHWA lists  
2 the agencies. It says the name of the project. It says the  
3 TBTA and the project sponsors are issuing this notice to advise  
4 the public of availability of the final EA and the -- the draft  
5 FONSI.

6 THE COURT: From date X to date Y.

7 MS. MYERS: Right. That the --

8 THE COURT: Right.

9 MS. MYERS: -- commentary is there. So this the  
10 intro. It introduces the documents. It says, The purpose of  
11 the project is to reduce congestion in the CBD. It says, In  
12 compliance with the regulations on NEPA, the final EA.

13 THE COURT: Does it list them or just is it a generic  
14 statement?

15 MS. MYERS: It cites 40 CFR -- parts 1500 to 1508 --

16 THE COURT: Okay.

17 MS. MYERS: -- the whole part.

18 THE COURT: Okay.

19 MS. MYERS: It says, The final EA was prepared to  
20 evaluate the potential of and identify any environmental  
21 impacts and mitigation for the project in consideration of  
22 public and agency input, responds to comments received with the  
23 draft EA.

24 THE COURT: Right.

25 MS. MYERS: And FHWA intends to apply 23 USC 13 -- 139

1 (1) limitations on claims, any decision it may issue with  
2 respect to the project.

3 As the project requires, FHWA's approval, it's subject  
4 to a different act of the Department of Transportation and FHWA  
5 regulations. In accordance with the regulations, FHWA makes a  
6 *de minimis* impact finding for the project. And then it says,  
7 The availability of the final EA and draft FONSI, it says the  
8 sentence I read to you. It says where you can access it. And  
9 it gives websites and phone numbers.

10 THE COURT: Does it say anything about the receipt of  
11 comments on either document?

12 MS. MYERS: No.

13 THE COURT: There is -- there's -- so from what you  
14 are reading, there is no guidance nor instruction?

15 MS. MYERS: There is no guidance or instruction on  
16 whether or not you submit a document, it will be considered.

17 THE COURT: Well, whether even a document could be  
18 submitted.

19 MS. MYERS: Well, it opens the public availability  
20 period.

21 THE COURT: Right.

22 MS. MYERS: And it --

23 THE COURT: But it doesn't -- public availability is  
24 public availability. Right? It means you get to look at it.  
25 Right? But it doesn't -- what I am asking you is, does it say

1 anything about what the public may do during that 30-day  
2 window? Other than look at it.

3 MS. MYERS: It -- it uses the term public  
4 availability.

5 THE COURT: Okay. It does not use the word comment.  
6 It does not talk about the submission of comments. It does not  
7 talk about a document or a posting anywhere that would provide  
8 guidance or instruction about the submission of comments.

9 MS. MYERS: Correct.

10 THE COURT: And it does not say in any way, shape, or  
11 form that comments cannot be submitted.

12 MS. MYERS: Correct.

13 THE COURT: Okay.

14 Continue.

15 MS. MYERS: The FHWA has said it read the comments  
16 that were submitted during that period and made a determination  
17 nothing needed to be changed to the document.

18 So, again, there was no notice to the members of the  
19 public or New Jersey about whether or not these documents --  
20 the letters submitted during the public availability period  
21 would be considered or not. They said they considered it, but  
22 now they are saying we also waived our arguments. And we are  
23 saying that is unreasonable.

24 Second, I would like to talk about the EPA email that's  
25 been cited a bunch of times -- a bunch of times.

1           This is at DOT\_0045366.

2           THE COURT: There's apparently two EPA documents,  
3 right, there's the letter which you seem to indicate is the  
4 State of New Jersey endorses. And then there is a document  
5 that I believe is an email that represents a summary of  
6 whatever consultation took place between the FHWA and the EPA  
7 regarding those initial comments.

8           MS. MYERS: Correct.

9           THE COURT: Okay. And you are talking about that  
10 second piece of correspondence?

11          MS. MYERS: Yes.

12          THE COURT: You may continue.

13          MS. MYERS: The EPA says, quote, We reviewed the  
14 updated draft and acknowledged the improvements. But EPA  
15 encourages FHWA and the project sponsors to consider including  
16 a commitment to develop an adaptive management plan during or  
17 after the final tolling schemes, access and evaluate the  
18 feasibility of all mitigation, ongoing meaningful public  
19 engagement, and develop their plan based on the final tolling  
20 structure.

21          THE COURT: So adaptive management plan is the more  
22 formal, long form of mitigation?

23          MS. MYERS: Yes.

24          THE COURT: Okay.

25          MS. MYERS: That the EPA refers to. And my point of

1 bringing this up is it does not say that, you know, we outright  
2 approve everything you did. It is an acknowledgment of the  
3 improvements.

4 THE COURT: Right and --

5 MS. MYERS: It is not a stamp --

6 THE COURT: You're arguing to the Court that the  
7 inferences of -- the inferences that the government would like  
8 the Court to draw from that document, you disagree with.

9 MS. MYERS: They are a little far stretched from what  
10 the document says --

11 THE COURT: Okay.

12 MS. MYERS: -- in my opinion.

13 Third, you asked the government about which agencies  
14 were invited to participate in the process. And they cited you  
15 to DOT\_0037042 to 43.

16 This does not explain why they chose these agencies to  
17 participate. It lists the agencies that were invited to  
18 participate, but it doesn't say we reached out to these types  
19 of agencies because of why. It does not give an explanation as  
20 to why it invited these specific agencies.

21 Fourth --

22 THE COURT: The conclusion without the rationale.

23 MS. MYERS: Exactly.

24 The government also brought up the New Jersey Planning  
25 Authority as one of the organizations that was invited to



1 participate. Sorry. The North Jersey Transportation Planning  
2 Authority, as explained in the June comment letter. That  
3 agency has indicated there were no presentations made to it  
4 outlining the specific impacts of the project and none of the  
5 other New Jersey agencies delegated their authority to this  
6 one.

7 Finally a couple --

8 THE COURT: Let me just ask this question.

9 There was a representation made to the Court that that  
10 entity has within its penumbra -- I don't want to use the word  
11 responsibilities, but the scope of what it deals with also  
12 deals with environmental/health issues. It's not just  
13 transportation, quad transportation.

14 MS. MYERS: I think the government said that that  
15 agency also deals with the state implementation plan, not that  
16 it also encompasses --

17 THE COURT: The SIP.

18 MS. MYERS: Exactly. So we are obviously not  
19 disputing that, but it is not the Environmental Protection --

20 THE COURT: Right.

21 MS. MYERS: -- And Health Agency --

22 THE COURT: Right.

23 MS. MYERS: --- that is primarily is in charge of the  
24 state.

25 THE COURT: Okay.

1 MS. MYERS: Finally, there was some mentions about a  
2 meeting between Governor Murphy and the secretary of  
3 transportation. That meeting occurred on May 26, 2023. It was  
4 after the final EA and the draft FONSI in that public  
5 availability period and after the governor's call, as you can  
6 tell by the timeline. Two weeks later, the June letter comes  
7 in. And this email they cite outlines all of the concerns that  
8 we've raised and that the governor raised in the June 12th  
9 letter, that the talking points that were prepared for the  
10 secretary, acknowledges the issues that we have with the  
11 documents at the end of the day.

12 So I just wanted to make sure that the Court is aware of  
13 the full contents of this email and the timing of how, after  
14 the call, the comment letter came in.

15 THE COURT: What is the implication? The governor met  
16 with the Secretary of Transportation. So? What am I supposed  
17 to do with that? What is the implication of that? How does  
18 that affect, one, the decision-making, or, two, what the Court  
19 is supposed to do in reviewing the issue s in this case?

20 MS. MYERS: I think that the reason the government  
21 brought this up was to show that there was participation with  
22 the governor's office and the state, and our response to that  
23 is that yes, they had this conversation that outlined all of  
24 our concerns and then they were memorialized in a letter. So  
25 it goes to show the reasonableness on behalf of the State of

1 New Jersey in participating in the process and memorializing  
2 their concerns.

3 THE COURT: But if it was not memorialized in a  
4 letter, would there be any document in the record evidencing  
5 the fact that there was a meeting and, arguably, the topics  
6 that may have been discussed?

7 MS. MYERS: Yes. That is at DOT\_0045346.

8 THE COURT: So there are two documents in the record  
9 that evidence this meeting and the topics discussed, the  
10 governor's letter and the document that you just referred to?

11 MS. MYERS: I don't know if the governor's letter  
12 specifically refers to the meeting, but I was acknowledging  
13 that he sent the letter two weeks after -- two weeks after this  
14 meeting.

15 THE COURT: All right. Let's roll this back to make  
16 sure I have this correct.

17 There was a meeting. What you have said to me is that  
18 two weeks after this meeting, the governor sent a letter.

19 MS. MYERS: Correct.

20 THE COURT: Is that letter in any way, shape, or form  
21 memorialize the fact that there was a meeting and the topics  
22 discussed at that meeting?

23 MS. MYERS: No, not specifically.

24 THE COURT: The only memorialization is the last  
25 document that you referred to, which is, in essence, a memo to

1 the file that emanated, I am assuming, from the secretary's  
2 office and was transmitted to the Federal Highway  
3 Administration?

4 MS. MYERS: It is talking points from the New York  
5 representative of DOT to other people at DOT and the talking  
6 points are in the body of the email. I think your Honor asked  
7 about this a couple weeks ago for like the fulsome record,  
8 where was the rest of the information here.

9 THE COURT: Right.

10 MS. MYERS: We are similarly just operating off of  
11 what's in the record. These are the DOT talking points.

12 THE COURT: The New York State DOT or the New York  
13 Office of the U.S. DOT?

14 MS. MYERS: New York Office of the U.S. DOT.

15 THE COURT: Who was, arguably, present at the meeting  
16 with the governor and secretary or not?

17 MS. MYERS: I do not know.

18 THE COURT: I will draw whatever inferences I need to  
19 draw from it, but you have clarified what's in the record and  
20 what's not in the record. I appreciate it.

21 MS. MYERS: No problem.

22 THE COURT: Anything more, Ms. Myers?

23 MS. MYERS: No, your Honor.

24 THE COURT Thank you. I appreciate it.

25 Mr. Cumming, you are up.

1           How much time do we need, Mr. Cumming? Seven minutes?  
2           Ten minutes?

3           MR. CUMMING: Probably about three, your Honor. I  
4           have two very quick points.

5           THE COURT: Go ahead.

6           MR. CUMMING: And I will sit down.

7           Your Honor asked for citations about the draft FONSI  
8           Ms. Myers provided the notice to.

9           The draft FONSI itself is at 40615. That does note that  
10          the public could submit feedback about new information -- new  
11          information in the draft FONSI.

12          THE COURT: So somebody has to go dig through the  
13          draft FONSI to find out that they have the authority to  
14          comment?

15          MR. CUMMING: They have the ability to submit  
16          feedback.

17          THE COURT: But the point is it is not in the notice.  
18          You have got to go dig through the document itself, whether it  
19          is on page 1 or page 2 or page 23, the point is there is no  
20          indicia in the notice that you have to go look someplace else.  
21          So if you don't happen to fully read the particular page in the  
22          FONSI, right, you got no idea whether you can comment.

23          MR. CUMMING: I believe that's true.

24          THE COURT: Okay.

25          What page in the FONSI is the notification that you can

1 provide feedback? Is it relatively upfront.

2 MR. CUMMING: It is at 40615. That is the pin cite to  
3 the page within the document starting at DOT\_40589.

4 THE COURT: Is that the first page of the document,  
5 the second page, the 13th page? Do we know?

6 MR. CUMMING: I don't know, your Honor. I just looked  
7 at it, but I don't remember what page it is at. I apologize.

8 THE COURT: Anything else, Mr. Cumming?

9 MR. CUMMING: The FONSI itself --

10 THE COURT: Hold on. Ms. Peltz is coming to your  
11 rescue.

12 MR. CUMMING: I can't give you the specific page, but  
13 that comment I referred to is at the end of the FONSI in what  
14 is kind of a Q & A section of the document.

15 THE COURT: It's at the end of the FONSI.

16 How many pages is the FONSI, roughly?

17 MR. CUMMING: About 30.

18 THE COURT: Okay. I will accept it is what it is.

19 Whether or not it could have been done better, that is a  
20 different question.

21 Anything else, Mr. Cumming?

22 MR. CUMMING: I will just note on that point,  
23 your Honor, the notice of availability is the availability of  
24 the FONSI, so the public can review it.

25 THE COURT: Right.

1 MR. CUMMING: That is implied in the notice.

2 THE COURT: You provided the opportunity in compliance  
3 with the regulations. Whether or not what you provided in  
4 terms of notice, the Court will it figure out.

5 MR. CUMMING: Nothing further.

6 THE COURT: Well, it is why we're here. Right?  
7 People are arguing. Reasonable people can differ, and my job  
8 is to figure it out, and I will.

9 Anything more, Mr. Cumming?

10 MR. CUMMING: Nothing further.

11 THE COURT: Mr. Chertok, you are up.

12 MR. CHERTOK: Just a couple of comments, your Honor.  
13 The purpose of bringing up the meeting with the  
14 secretary as well there was an earlier meeting -- let me back  
15 up.

16 There is no reason that the comments that were made to  
17 the secretary that are memorialized in the June 2023 letter  
18 could not have made -- been made during the comment period.

19 Indeed, the --

20 THE COURT: In your view.

21 MR. CHERTOK: Well, I think in any fair view because  
22 they were comments by 20,000 people on the contents of the  
23 draft EA, including some of the issues that could have been  
24 raised by New Jersey, but were not.

25 THE COURT: Okay.

1 MR. CHERTOK: I think it's fair to say they had the  
2 opportunity. They did not avail themselves of that  
3 opportunity.

4 There was also a meeting with a deputy secretary of FHWA  
5 prior to the September 2022 letter that was referenced.

6 THE COURT: Is that memorialized in the record?

7 MR. CHERTOK: Yes. It is in the letter from the  
8 governor in the September 9th letter, which is 7768.

9 The point is that New Jersey certainly had access if it  
10 wanted it, and it could have raised these comments.

11 A couple of points that were raised earlier, the notice  
12 of availability, the key reason for it is to inform the public  
13 that after that period expires, the final FONSI may issue.  
14 That is a public information purpose of the availability --  
15 notice of availability.

16 Also, the draft EA only mentioned one comment period.  
17 It didn't talk about multiple comment periods. That's because  
18 the regulations don't contemplate multiple periods.

19 THE COURT: I thinks that's a fair point, Mr. Chertok,  
20 but we have got an integrated process with multiple documents  
21 whose issuance in draft and issuance in final build on one  
22 another.

23 So I accept your comment for what it is, but I am not  
24 quite sure that I am willing to accept it as an absolute  
25 position as for all.



1 MR. CHERTOK: Fair enough, your Honor.

2 I think that the main point is that there was nothing  
3 that barred New Jersey from commenting.

4 THE COURT: I accept that that's your position, and I  
5 understand it fully, and you have repeated it several times,  
6 and we have had an interchange about it.

7 MR. CHERTOK: In terms of the EPA letter and the fact  
8 that we're drawing unfair inferences from that --

9 THE COURT: I don't know that we're drawing unfair  
10 inferences. The question is: Are we drawing any inferences  
11 from it?

12 MR. CHERTOK: Well, we are not drawing inferences. We  
13 are basing it on the letter. The negative inferences are being  
14 drawn by New Jersey, but the main comment --

15 THE COURT: Well, are being suggested and argued to be  
16 drawn by New Jersey.

17 MR. CHERTOK: Fair enough.

18 The point -- the main point of EPA was to use an  
19 adaptive management, and that is exactly what was included in  
20 the mitigation program. Ms. Knauer described that, so I don't  
21 want to repeat her description, but it is in the document and  
22 it provides for evaluation consistently of the impacts of the  
23 project and adjustments about to be made, and it has a public  
24 involvement component, which is the key areas that EPA focused  
25 on.

1           So I think there is not much to say except I will  
2 repeat, in danger of slightly angering your Honor,  
3 New Jersey --

4           THE COURT: Oh, come now. I am a pussy cat.

5           MR. CHERTOK: -- New Jersey had the opportunity.

6           It purposely, for whatever reason, did not avail itself,  
7 and now it finds itself in the position of the petitioner in  
8 *Vermont Yankee*, which is the traditional ambush case.

9           Thank you, your Honor.

10          THE COURT: You're welcome, Mr. Chertok.

11          We are now done with New Jersey participation.

12          Clean Air Act, we will turn our attention to that.

13          Well, it looks like I have got the pleasure again of  
14 Mr. Mastro.

15          Mr. Mastro, we are talking about 20 minutes and whatever  
16 it is you need, you will tell me.

17          MR. MASTRO: Yes, your Honor. I am going to try to be  
18 uncharacteristically brief. I will reserve ten minutes because  
19 I'm hoping to go ten minutes or less.

20          THE COURT: Mr. Mastro, ten minutes or less.

21          MR. MASTRO: The argument is pretty straightforward,  
22 your Honor.

23          THE COURT: Is it?

24          MR. MASTRO: The Clean Air Act, it requires that there  
25 be -- in this context, for the FHWA to approve, there has to be

1 compliance with the Clean Air Act and it requires when a state  
2 has an implementation plan, that the state's implementation  
3 plan, you know, that there be a conformity study for that  
4 reason.

5 THE COURT: Mr. Mastro, I have a real easy question.  
6 It is based on an observation.

7 You have a PowerPoint presentation here involving the  
8 Clean Air Act, which runs for approximately 15 slides.  
9 Correct?

10 MR. MASTRO: Yes. I am going to use very few of them.

11 THE COURT: Mr. Mastro, how many pages did you devote  
12 to your arguments on clean air in your affirmative opening  
13 brief and in your response/reply to the cross motion?

14 MR. MASTRO: Very little, your Honor.

15 THE COURT: And the answer is very little. Maximum,  
16 being generous, somewhere in the range of, perhaps,  
17 three-and-a-half pages, during which there is nary a cite to  
18 any case precedent.

19 So my question to you is: How seriously do you want the  
20 Court to take this issue when you didn't dedicate much of  
21 anything to the argument in your affirmative brief and in your  
22 reply brief? What am I supposed to do? This goes beyond the  
23 scope of what is in your brief.

24 MR. MASTRO: So, your Honor, some of that is because  
25 I'm responding to arguments that they have raised about whether

1 this is --

2 THE COURT: Mr. Mastro, you had the opportunity in  
3 your reply to respond to their arguments. You were about a  
4 page. Right? What am I supposed to do with this?

5 MR. MASTRO: Your Honor, I shouldn't be punished for  
6 brevity. I said this was a simple argument.

7 THE COURT: No. Come now, Mr. Mastro. Don't accuse  
8 the Court of punishing you.

9 MR. MASTRO: I am not, your Honor.

10 THE COURT: You made the --

11 MR MASTRO: I'm making a joke.

12 THE COURT: -- affirmative statement in a page and a  
13 half.

14 MR. MASTRO: Yes.

15 THE COURT: And you didn't develop the argument.  
16 Right? There is very clear precedent that says if you avert to  
17 an argument without development, the Court can deem it waived.

18 And so I am asking you why shouldn't I deem the argument  
19 waived?

20 MR. MASTRO: Because --

21 THE COURT: You didn't care enough to develop the  
22 argument.

23 MR. MASTRO: Your Honor --

24 THE COURT: Tell me that I'm wrong, and I will be  
25 happy to be corrected.

1 MR. MASTRO: Thank you, your Honor.

2 You are right that we didn't develop a lot -- spend a  
3 lot of pages on this argument because it is so straightforward.

4 There was no conformity analysis done of conformity with  
5 New Jersey's state implementation plan, and that's required  
6 under the Clean Air Act. So that's all we needed to say.

7 THE COURT: Really?

8 MR. MASTRO: They did it for New York. They did it --

9 THE COURT: Really?

10 MR. MASTRO: -- for New York, but they didn't do it  
11 for New Jersey.

12 THE COURT: So all you needed to do was generally  
13 avert to the issue and leave it to the Court or the other  
14 parties to do the development of the argument.

15 MR. MASTRO: No, your Honor.

16 It is not -- it is not a debated question whether there  
17 has to be a conformity analysis under a state implementation  
18 plan. They did it for New York, and --

19 THE COURT: Disparate treatment? Now you are arguing  
20 differentiated treatment? They did something for New York but  
21 not for New Jersey.

22 MR. MASTRO: They should have done it for both because  
23 both --

24 THE COURT: Did you make the point in your brief?

25 MR. MASTRO: We did make the point, your Honor, that

1 they should have done it for New Jersey, too. Absolutely, we  
2 made that point.

3 And that's why I said I will take very little time here  
4 today because most of what I might have to say would be  
5 responding to their arguments --

6 THE COURT: I think you are getting help from  
7 Ms. Myers.

8 MR. MASTRO: Well, I don't know if I am getting help.  
9 I'm being told --

10 THE COURT: Well, maybe you want to let her stand  
11 there and answer the questions.

12 MR. MASTRO: No, your Honor.

13 I am just being told two pages in the opening brief and  
14 four in the reply. That is not really your issue.

15 I am explaining to you --

16 THE COURT: I will give you the benefit of the doubt  
17 that you were double the number of pages that I referred to.

18 MR. MASTRO: Your Honor, that is really not -- not the  
19 issue.

20 I understand and your Honor asked at the beginning of  
21 the case to emphasize the arguments that we thought were more  
22 important. We did that. We have emphasized the NEPA claims.  
23 We did not ignore the Clean Air Act claim, and we said it was a  
24 very simple argument.

25 New Jersey has a state implementation plan in every

1 major category and every area, it doesn't meet the EPA's  
2 standards on ozone layer and in many other categories, it is in  
3 a maintenance status where it has to be monitored. Therefore,  
4 to just do New York, which doesn't have nonattainment in every  
5 category under the EPA standards, but to not do New Jersey  
6 where it actually has nonattainment in every county on ozone  
7 layer and maintenance in others, it should have done  
8 New Jersey, too, to comply with the Clean Air Act. It is that  
9 simple an argument.

10 So I didn't think I needed to go on page after page  
11 after page to make it.

12 I certainly didn't waive it, but I didn't need to say a  
13 lot to do it, and I stood up here at the outset to tell  
14 your Honor I didn't need a lot of time on this issue, because  
15 it is a simple argument.

16 THE COURT: Okay.

17 MR. MASTRO: Thank you, your Honor.

18 THE COURT: If I made a misrepresentation as to what  
19 you devoted in your argument, I apologize.

20 MR. MASTRO: You did not, your Honor. We did not  
21 devote a lot of time to it, and I wasn't contesting that. I  
22 was saying that we devoted overwhelming amount of attention to  
23 NEPA --

24 THE COURT: Right.

25 MR. MASTRO: -- the failure of any mitigation, the

1 failure to have any mitigation analysis, the failure to take  
2 New Jersey into account and explain that.

3 And then I did Clean Air Act to say, you didn't even  
4 look at the state implementation plan.

5 THE COURT: It is a secondary level issue. It is not  
6 a primary level issue.

7 MR. MASTRO: But that doesn't mean I waived it,  
8 your Honor.

9 THE COURT: That is a different story.

10 MR. MASTRO: Thank you, your Honor.

11 THE COURT: You are welcome.

12 Ms. Howard.

13 MS. HOWARD: Thank you, your Honor.

14 THE COURT: Okay. Ms. Howard.

15 MS. HOWARD: Thank you, your Honor.

16 Your Honor, I just want to state just about the  
17 PowerPoint, that we would have similar concerns as the Court --

18 THE COURT: We will deal with it at the end.

19 MS. HOWARD: Thank you, your Honor.

20 Also, we would begin by saying that this conformity  
21 argument was waived. It was not preserved --

22 THE COURT: Ms. Howard, do me a favor.

23 MS. HOWARD: Yes, sir.

24 THE COURT: Just take a deep breath, count to three,  
25 relax.



1 MS. HOWARD: I feel relaxed.

2 THE COURT: I am not going to bite. I'm not coming  
3 over there to that side of the bench.

4 MS. HOWARD: I don't feel like you are going to bite.  
5 Your Honor, my voice is actually suffering from an  
6 actual medical condition.

7 THE COURT: Okay. All right.

8 MS. HOWARD: It seems labored, but that is just how I  
9 have to speak, but I feel relaxed. I feel good.

10 THE COURT: Good. I want you to be comfortable up  
11 there.

12 MS. HOWARD: I just want to make sure they can hear  
13 me.

14 THE COURT: I want you to be comfortable up there.

15 MS. HOWARD: I want to make sure I represent  
16 Federal Highway appropriately on this matter, your Honor.

17 THE COURT: Back to your point.  
18 You believe the issue is waived?

19 MS. HOWARD: Yes, your Honor.

20 THE COURT: Tell me why.

21 MS. HOWARD: Well, the draft environmental assessment  
22 had the draft conformity analysis and determination there was  
23 clearly marked and labeled. Section 10.4 stated transportation  
24 conformity determination.

25 So it was available. And we've talked ad nauseam about

1 the time frames that this was available, but New Jersey did not  
2 submit a comment saying that there needed to be a conformity  
3 analysis devoted to the New Jersey State Implementation Plan,  
4 or as your Honor refers to it, SIP. That was nowhere in there.

5 THE COURT: Let me ask you this question, Ms. Howard.

6 MS. HOWARD: Yes, your Honor.

7 THE COURT: Was there any change from the draft EA to  
8 the final EA of any substance on conformity?

9 MS. HOWARD: No, your Honor.

10 THE COURT: So it is not as if the issue arose anew  
11 because of a change in position?

12 MS. HOWARD: No, your Honor, it did not.

13 Also, even though Mr. Mastro did not state it here  
14 today, the second issue they raised about conformity in their  
15 briefs was consultation with New Jersey agencies on conformity.  
16 That, too, was not in their comments to the draft EA or draft  
17 conformity analysis.

18 So we believe both of those arguments were waived.

19 But even if they were not waived, your Honor,  
20 Federal Highways complied with the transportation conformity  
21 regulations and those regulations can be found at 40 CFR  
22 part 93, subpart A.

23 Your Honor, if you will turn to page 12 of our handout  
24 from today, we have for you --

25 THE COURT: Okay. Hold on one second, among the pile

1 of documents I have...

2 Slide 12 entitled Conformity Criteria?

3 MS. HOWARD: Yes, your Honor.

4 THE COURT: Proceed.

5 MS. HOWARD: This lays out what is required for  
6 conformity analysis for transportation activities.

7 And when you look at this, you can see what was required  
8 for projects, which is what this is, a transportation project.

9 Now, that is on the right-hand side of the slide. A  
10 project from a conforming plan and TIP, which is what this is,  
11 TIP is Transportation Improvement Program, that requires that  
12 it is in the currently conforming plan and TIP, that the  
13 project has the hotspot analysis that we have been talking  
14 about in this two-day presentation.

15 So the hotspot analysis is for carbon monoxide and  
16 particulate matter, and, your Honor, that is what we did for  
17 this project, and we included New Jersey counties in that  
18 analysis.

19 THE COURT: I don't think there is a dispute that you  
20 included New Jersey counties.

21 MS. HOWARD: Yes, your Honor.

22 THE COURT: There may be a dispute as to which  
23 counties or how many count ies, but there is not a dispute to  
24 the fact that you included some New Jersey counties.

25 MS. HOWARD: That's true, but also as it relates to

1 conformity, that issue was not raised. They said it needed to  
2 be done related to the New Jersey State Implementation Plan.  
3 And the point that I am trying to make is that for conformity  
4 for projects, you do not compare them to the State  
5 Implementation Plan. You conduct the hotspot analysis that is  
6 required for that type of project.

7 Now --

8 THE COURT: So you're saying that New Jersey is  
9 arguing that there has to be some comparison to the SIP between  
10 the SIP and the TIP? Or that New Jersey is arguing that there  
11 has to be some comparison between the SIP and the TIP? Or that  
12 the TIP must -- is governed by the SIP?

13 MS. HOWARD: So, your Honor, it would be helpful if we  
14 talk about what a Transportation Improvement Program is,  
15 because I think I am confusing you a little bit.

16 THE COURT: Okay.

17 MS. HOWARD: The Transportation Improvement Program is  
18 conducted regionally. It is a four-year look at all of the  
19 projects that are being done for transportation in a  
20 Metropolitan area. That is not what this is.

21 This project is a singular project. So for singular  
22 projects, you do the hotspot analyses. You don't do the  
23 analysis of the project directly compared to the State  
24 Implementation Plan.

25 THE COURT: Let me see if I can unconfuse myself.

1           So the left-hand side deals with the TIP, which you just  
2 said to me is on a regional basis. Correct?

3           MS. HOWARD: Yes, your Honor.

4           THE COURT: On the right-hand side, we've got a  
5 project, the top or the bottom? From a conforming or from a  
6 non -- not from a conforming plan?

7           MS. HOWARD: Your Honor, this project is from a  
8 conforming plan and TIP. So that is what we focused on.

9           THE COURT: So the -- the project emanates from a  
10 conforming plan and TIP. And is the evaluation that's laid out  
11 here in 93114, 15, 16, and 17 is self-contained? Is that what  
12 you are telling me?

13          MS. HOWARD: Yes, your Honor.

14          THE COURT: Okay.

15          MS. HOWARD: That is what is required for this  
16 project.

17          THE COURT: It has no relationship to nor draws  
18 information from a SIP -- the New Jersey State SIP.

19          MS. HOWARD: Not directly because the SIP comes in at  
20 the TIP level and at the plan level. The plan is a 20-year  
21 look. The TIP is the four-year look.

22          THE COURT: All right.

23          MS. HOWARD: And then you have individual projects --

24          THE COURT: Okay.

25          MS. HOWARD: -- which is this.

1 THE COURT: Pyramid.

2 MS. HOWARD: Pyramid.

3 THE COURT: The top of the triangle is the SIP. The  
4 middle of the triangle is the SIP. The individual --

5 MS. HOWARD: TIP.

6 THE COURT: I'm sorry. It's the TIP.

7 MS. HOWARD: Yes.

8 THE COURT: I'm sorry. No. The SIP -- the SIP  
9 informs the middle of the triangle, yes or not?

10 MS. HOWARD: Yes, sir.

11 THE COURT: The SIP does not inform the project  
12 bottom-part of the triangle?

13 MS. HOWARD: Not directly, no, sir.

14 THE COURT: No, not directly. Where as the top two  
15 parts of the triangle, it does.

16 MS. HOWARD: Yes, sir.

17 THE COURT: Okay. Now I got it.

18 MS. HOWARD: And, your Honor, so New Jersey's argument  
19 that Federal Highways was required to analyze this project  
20 against New Jersey's State Implementation Plan has no legal  
21 basis and New Jersey has not provided us with one.

22 Similarly, for their argument that we were required to  
23 consult with several agencies from New Jersey, that -- they  
24 haven't provided any legal basis for that.

25 So pending your questions, your Honor, I will just state

1 that New Jersey waived its conformity arguments and even if New  
2 Jersey did not waive those conformity arguments, Federal  
3 Highways did what it was supposed to do in accordance with the  
4 federal transportation conformity regulations, which can be  
5 found at 40 CFR part 93, subpart A.

6 THE COURT: Ms. Howard, thank you for clarifying  
7 things.

8 Can you either explain to me or point me to where in the  
9 record I can find an explanation as to why a conformity  
10 analysis was conducted for New York with respect to the  
11 New York SIP and not the New Jersey SIP?

12 MS. HOWARD: So your Honor --

13 THE COURT: Assuming I am not confusing things.

14 MS. HOWARD: If we could -- yes, your Honor. It is  
15 very confusing. But if you look at DOT\_0037816, that is  
16 Section 10.4, Transportation Conformity and Determination. It  
17 discusses where the project was placed in the transportation  
18 improvement program and that that program confirmed that the  
19 project conformed to the SIP for New York.

20 So it wasn't directly on the project level. And that is  
21 an important distinction to make.

22 THE COURT: I think you have to do that again for me,  
23 Ms. Howard, because I am not quite sure I follow.

24 MS. HOWARD: Yes, your Honor.

25 If -- if I may have one moment. I -- I am not sure if I

1 have enough copies for everyone of this --

2 THE COURT: Well --

3 MS. HOWARD: -- because it might be easier.

4 THE COURT: Help me understand. May I? Let's do  
5 this.

6 MS. HOWARD: Yes, sir.

7 THE COURT: Because may be it is easier if --  
8 The -- the conformity analysis with respect to  
9 New York.

10 MS. HOWARD: Yes.

11 THE COURT: The top of the right column or the bottom  
12 of the right column?

13 MS. HOWARD: Top of the right column.

14 THE COURT: New Jersey, top of the column or bottom of  
15 the column?

16 MS. HOWARD: New Jersey is not on this table.

17 THE COURT: It is not. It is not on this side? I  
18 thought that's what we --

19 MS. HOWARD: New Jersey doesn't have a project, your  
20 Honor.

21 So the project is the --

22 THE COURT: But the project concerns or impacts  
23 New Jersey.

24 MS. HOWARD: Right. And --

25 THE COURT: But because it is a New York State



1 originating project, that defines which state it's a project  
2 of. Right? Because it is emanating from New York State  
3 statute.

4 MS. HOWARD: Yes, your Honor.

5 THE COURT: Okay. So the -- the comparison or the  
6 look-see with respect to the New York SIP is because it is a,  
7 quote -- my quote, air quotes -- a New York project. Not a  
8 New Jersey project. Therefore, the New Jersey SIP is not  
9 relevant to the -- to the analysis on the top part of the chart  
10 because it is a New York project that involves the New York  
11 SIP. So you can't -- you don't look outside the confines of  
12 the, air quotes, defined project.

13 MS. HOWARD: On the project level, that is correct.

14 THE COURT: Okay. I got it. Okay. So that is why  
15 the distinction New York SIP versus -- versus New Jersey SIP.

16 MS. HOWARD: Yes, your Honor.

17 THE COURT: Okay. So in support of its argument that  
18 it sought a conformity analysis for New Jersey from the FHWA,  
19 plaintiff highlights its letter in which it states that,  
20 Continuing elevated levels of PM-2.5 in the Fort Lee area could  
21 contribute to a classification of nonattainment when the EPA  
22 implements the new lower PM-2.5 max.

23 Can you explain how the agency addressed plaintiff's  
24 concern or at least how it explained the decision that  
25 plaintiff's concern did not merit action given that it did not

1 conduct the conformity analysis for New Jersey?

2 MS. HOWARD: Yes, your Honor.

3 Well, first I want to state that that statement was not  
4 in response to the draft environmental assessment or draft  
5 conformity analysis. That was the June 12, 2023 letter that we  
6 have been talking about.

7 THE COURT: So your position is the agency never had  
8 an opportunity to address the concern.

9 MS. HOWARD: That is correct.

10 THE COURT: Okay.

11 MS. HOWARD: But even if they did, that concern is not  
12 specific enough to alert the agency that New Jersey felt that  
13 the agency needed to conduct a conformity analysis related to  
14 the New Jersey State implementation plan.

15 THE COURT: So what would be specific enough? I mean,  
16 the letter points out elevated levels of PM-2.5 in the Fort Lee  
17 area. It points out nonattainment. And it points out when the  
18 EPA implements new lower PM-2.5 max.

19 What more does the agency need in terms of specificity?

20 MS. HOWARD: Well, the reason it is not specific  
21 enough is because of the state of the law.

22 The law for the project says that hotspot analysis is  
23 how you would address the issues in any area that pertains to  
24 the project.

25 So we would not think that New Jersey wants an analysis

1 related to New Jersey State Implementation Plan because that is  
2 not the state of the law.

3 So if they are asking for something that is outside of  
4 what the law would tell us to do, then we would need to know  
5 that specifically. Because we would have no idea. Reading  
6 that one would think --

7 THE COURT: So --

8 MS. HOWARD: -- that perhaps it is hotspot analysis  
9 under air quality.

10 THE COURT: So what I think you are saying to me is  
11 because they didn't use the magic words of hotspot analysis,  
12 which is in the law, that that renders this not specific  
13 enough?

14 MS. HOWARD: No, it is not hotspot analysis. But what  
15 they are asking for is a direct comparison of this project to  
16 New Jersey state.

17 THE COURT: This project, meaning the New York  
18 project.

19 MS. HOWARD: The New York project.

20 THE COURT: To New Jersey SIP standards.

21 MS. HOWARD: Correct.

22 THE COURT: Ah.

23 MS. HOWARD: And -- and we would have no way of  
24 knowing that because that would never be something that the  
25 agency would do because the transportation --

1 THE COURT: The agency -- it is not the agencies --  
2 all right.

3 So now this leads to a different question. All right.  
4 Is this the first time that the agency is being asked to deal  
5 with border state issues? Right?

6 You have two states. Right? The project emanates in  
7 one state, not in the other. Is this the first time you are  
8 dealing with these kinds of issues that would occur in a border  
9 state situation?

10 MS. HOWARD: No, your Honor. It's not the first time.

11 THE COURT: Since it is not the first time -- I guess  
12 the question is what is the agency do when it is faced with a  
13 border state situation?

14 What has been its practice?

15 MS. HOWARD: In the conformity realm, the agency does  
16 hotspot analyses at the project level for all the areas. So  
17 Connecticut is also involved in this. So everywhere that's  
18 involved --

19 THE COURT: But it is at this level, at the TIP level.  
20 Right?

21 MS. HOWARD: Well, so your Honor, for the project, at  
22 the project level --

23 THE COURT: Right.

24 MS. HOWARD: -- that is hotspot analysis.

25 THE COURT: Right. Let's stop right there.

1           At the project level, you told me that the project is  
2 confined because it's, my air quotes, a New York project.

3           MS. HOWARD: Yes.

4           THE COURT: So therefore, the only hotspots the agency  
5 is going to look at are the hotspots inside of New York?

6           MS. HOWARD: No.

7           THE COURT: It is not going to look at hotspots  
8 outside of New York --

9           MS. HOWARD: No, your Honor.

10          THE COURT: -- even they are they are on the border?

11          MS. HOWARD: No, your Honor. They absolutely look at  
12 hotspots outside of New York. They look at --

13          THE COURT: So they look at the hotspots outside of  
14 New York but they don't use the -- the data or the -- the SIP  
15 from that area outside of New York?

16          MS. HOWARD: They do, but not at the project level.  
17 So it gets very complex at the -- at the next level.

18          THE COURT: Okay. Now I am really lost.

19          MS. HOWARD: What I am saying is for the project level  
20 when you are doing conformity, you look at the hotspot analysis  
21 and you also ensure that the project is included in the  
22 Transportation Improvement Program. At the Transportation  
23 Improvement Program, that is a separate process. Because they  
24 are look ing at all the transportation projects for a regional  
25 area to ensure that the air quality --

1 THE COURT: Okay. I have to wind this back because,  
2 unfortunately, I hear what you are saying, but I am just not  
3 processing it.

4 MS. HOWARD: Yes, sir.

5 THE COURT: So let see if you can help me.

6 So we have our triangle where the SIP gets pushed in at  
7 the top two levels and not at the bottom.

8 So help me understand what to do with hotspot analysis.  
9 Because hotspot analysis come in -- forget hotspot analysis.  
10 Does hotspot identification come in at the TIP level in the  
11 middle? Are hotspots identifiable at this above the project  
12 level?

13 MS. HOWARD: They are identifiable at the project  
14 level.

15 THE COURT: No. No. Answer my question. I am going to  
16 get to the project level.

17 Are there any hotspot -- is any hotspot identification  
18 done at the TIP level, the middle level of the triangle?

19 MS. HOWARD: So --

20 THE COURT: Let me phrase it differently.

21 Is the only place that they do hotspot identification  
22 and subsequent analysis at the project level?

23 MS. HOWARD: Your -- your Honor --

24 THE COURT: Or am I thoroughly confusing everything  
25 and making it difficult?

1 MS. HOWARD: Yes, it is somewhat confusing because in  
2 order to answer the question in the way your Honor is posing  
3 it, I would have to get into some other technical aspects of  
4 what happens at the TIP level and the planning level that would  
5 confuse further the issue because that becomes very technical.  
6 But there has to be some analyses to determine whether or not  
7 there will be compliance with the State Implementation Plan at  
8 the TIP level and at the planning level. And those are the  
9 type of analyses they do, hot spot analyses are done, but it's  
10 not just one project when you get to that level, because they  
11 are looking at four years worth of projects at the TIP level  
12 and are looking at 20 years' worth --

13 THE COURT: So they look at the hot spots at the TIP  
14 level?

15 MS. MYERS: They do.

16 THE COURT: Either they do or they don't.

17 MS. MYERS: They do.

18 THE COURT: Fine. That's great. That's all I need to  
19 know. They look at hot spots there.

20 Now you get to the project level. Right? The hot spots  
21 that are looked at or identified at the TIP level, do they  
22 carry down to the project level?

23 MS. HOWARD: They do inform the project level because  
24 that is how you would know where there are concerning areas.  
25 But --

1 THE COURT: And it is at that level that you then do  
2 the hotspot analysis?

3 MS. HOWARD: The project level?

4 THE COURT: I'm sorry?

5 MS. HOWARD: Or the TIP?

6 THE COURT: The project level?

7 MS. HOWARD: Yes, the project level you do the hotspot  
8 analysis.

9 THE COURT: Okay. And what do you bring to the table  
10 in doing that hotspot analysis at the project level? Assume  
11 for the sake of argument -- that's what we have here -- we have  
12 three states: Connecticut, New York, and New Jersey.

13 MS. HOWARD: Yes, sir.

14 THE COURT: I'm going to assume that hot spots have  
15 been identified across those three states. Yes?

16 And so when you are analyzing the hot spots, what's  
17 brought to the table with respect to any SIP relative to the  
18 three states? Is any SIP brought to the table to conduct that  
19 hotspot analysis? No.

20 MS. HOWARD: No, not in that way.

21 THE COURT: Okay.

22 MS. HOWARD: No, your Honor.

23 THE COURT: Okay. So you are conducting a hot spot  
24 analysis?

25 MS. HOWARD: Yes, your Honor.



1           THE COURT: Okay. Tell me what do I need to be  
2 looking at in terms of -- what are the critical things that go  
3 into the hotspot analysis, right, for me to be able to say  
4 whether that is reasonable or not with respect to the  
5 conformity issue?

6           MS. HOWARD: Well, we do have the actual hotspot  
7 analysis that was conducted. It is at Appendix 10 of the  
8 environmental assessment.

9           And what they look at is to see whether or not there  
10 will be any exceedances or increases in the --

11           THE COURT: Is there anything that you are looking at  
12 in state A or that you are bringing to the table to do that  
13 analysis for state A that is different than what you are doing  
14 for state B or state C? Or is it the same considerations  
15 across all three?

16           MS. HOWARD: It is the same considerations --

17           THE COURT: Okay.

18           MS. HOWARD: -- across all three.

19           THE COURT: Good. Now you are helping me understand  
20 what's going on. This is good.

21           Keep going.

22           MS. HOWARD: So you are looking to see if there are  
23 any exceedances or any -- actually, it is any increases in any  
24 of the identified pollutants to ensure that we will not be  
25 impacting the national ambient air quality standards.

1 THE COURT: Yes.

2 MS. HOWARD: And so when you do that analysis and you  
3 determine, as we did here for this project, that there will be  
4 no increases or exceedances that need to have any sort of  
5 control measures put in place, then you are able to say that  
6 your project is compliant with Clean Act -- Clean Air Act  
7 conformity.

8 THE COURT: Okay. Anything more?

9 MS. HOWARD: Nothing further, your Honor.

10 THE COURT: Okay. You answered -- you helped me  
11 understand the question, how to deal with the question.

12 I think we're good. We're done.

13 MS. HOWARD: Thank you, your Honor.

14 THE COURT: Ms. Knauer.

15 MS. KNAUER: I just would like to hand up -- I think  
16 this is what Ms. Howard was referring to. I don't have copies  
17 for everybody, but it is a page from the EA Section 10.4,  
18 the actual transportation conformity determination, because I  
19 thought it would -- just might illustrate what was -- what  
20 actually was done for this project.

21 THE COURT: Well, I think out of fairness to  
22 everybody, we are going to take a three-minute pause.

23 MS. KNAUER: Okay.

24 THE COURT: You want to go run a dozen copies, please.

25 (Pause.)

1 THE COURT: It is just the front page. Correct?

2 MS. KNAUER: Yeah, it's -- yes, just that one page,  
3 it's just that one paragraph --

4 THE COURT: No, no. Do we need to copy both sides?

5 MS. KNAUER: Two paragraphs -- no.

6 THE COURT: Just the front side, please.

7 MS. KNAUER: I -- I can begin my portion of the  
8 argument while we are waiting for that, if you would like,  
9 your Honor.

10 THE COURT: Are you going to refer to anything in that  
11 document?

12 MS. KNAUER: I -- I will -- I just -- while we are  
13 waiting for that, I would just like to emphasize the fact that  
14 in neither -- none of New Jersey's comments, either the ones on  
15 the draft EA, nor the later ones, did they raise conformity  
16 as -- as an issue.

17 THE COURT: Okay.

18 MS. KNAUER: And I think in their arguments in their  
19 briefs, and I can anticipate that this will be what they might  
20 say on rebuttal, was that this was such an obvious requirement  
21 that it was -- didn't -- it couldn't be waived by failure to  
22 exhaust.

23 That certainly doesn't apply here, where nobody raised  
24 it. If it was such an obvious requirement, not a single  
25 person, including EPA, the agency charged with enforcing the

1 Clean Air Act, did not raise it. And FHWA, which does  
2 transportation conformity analyses for all of its projects,  
3 didn't see it as an issue.

4 So I just -- I -- I think the obviousness exception to  
5 the administrative exhaustion requirement does not apply here.

6 And I think the rest of what I want to say is better --  
7 oh, here -- here we are. I have one.

8 THE COURT: Well, somebody has to give them out.

9 MS. KNAUER: Oh. Oh, I see. Oh, I am sorry. I  
10 misunderstood.

11 My colleague will -- will pass them out.

12 May I begin or should we --

13 THE COURT: No. Wait another ten seconds.

14 MS. KNAUER: Okay.

15 THE COURT: All right. Everybody who needs a copy has  
16 gotten a copy? Okay.

17 Go ahead.

18 MS. KNAUER: So I think this just helps to illustrate  
19 what Ms. Howard was explaining about the -- how the steps work  
20 for a project conformity analysis.

21 First is the question of whether the project is already  
22 included in a transportation improvement program that has been  
23 determined as a whole to conform. And that is in the first  
24 paragraph under Section 10.4. It refers to -- it says, The  
25 project was included in the regional emissions analysis for

1 NYMTC's most recent transportation conformity determination.

2           So that was the conformity determination for NYMTC,  
3 which is the region in which the project is located. It is  
4 TIP. And -- and -- and it determined that that entire TIP,  
5 which included the project, would not exceed regional -- would  
6 not exceed its regional emissions budgets under the Clean Air  
7 Act.

8           So it's not that there was any comparison of the project  
9 to the New York State implementation plan. It was -- it was  
10 included in a regional analysis -- or conformity determination.

11           So as Ms. Howard said, once a project has been included  
12 in a regional conformity determination, the only other thing  
13 that Part 93 requires is the hot -- the hotspot analysis.

14           And here, as Ms. Howard explained, the hotspot analysis  
15 was undertaken, determined not to exceed the national ambient  
16 air quality standards, which both the regulations and case law  
17 recognize is all that is needed for project level conformity.  
18 And the -- and the conformity determination was made.

19           The hot spots included hot spots in New Jersey. So it  
20 was -- there was no differentiation between New York and  
21 New Jersey as -- as -- as concerns the -- the conformity  
22 determination here.

23           THE COURT: As?

24           MS. KNAUER: The conformity -- project level  
25 conformity determination based on the hotspot analysis --

1 THE COURT: Yes. Okay. So it is --

2 MS. KNAUER: -- was conducted --

3 THE COURT: No differentiation in the hotspot  
4 analysis, which -- which led to the --

5 MS. KNAUER: Right.

6 THE COURT: -- conformity conclusion?

7 MS. KNAUER: Right. And -- and I will just point out  
8 that the -- in terms of conformity with A or with the  
9 applicable transportation or -- I am sorry.

10 THE COURT: It is all right.

11 MS. KNAUER: It -- it all -- there is certain --

12 THE COURT: This is tough. I had a hard time, so...

13 MS. KNAUER: That there is no requirement of looking  
14 at multiple transportation -- of conform -- of conformity  
15 determinations being made with multiple transportation  
16 improvement programs.

17 So it just -- it is -- it is just that once it is  
18 determined to be in a conforming transportation improvement  
19 program, the project can be determined in conformity based on  
20 the hotspot analysis alone.

21 THE COURT: Okay.

22 MS. KNAUER: I think -- I think -- I just wanted to  
23 provide your Honor with the --

24 THE COURT: Okay.

25 MS. KNAUER: -- actual determination that I think lays

1 out the steps that were --

2 THE COURT: Okay.

3 MS. KNAUER: -- that got to the point.

4 THE COURT: Thank you.

5 MS. KNAUER: Okay.

6 THE COURT: I appreciate it.

7 MS. KNAUER: I don't have anything further, except on  
8 rebuttal. We reserve the rest.

9 THE COURT: Okay. Very good.

10 MS. KNAUER: Thank you.

11 THE COURT: Mr. Mastro, I will be a lot more peaceful  
12 in your rebuttal.

13 MR. MASTRO: Not a problem, your Honor, I -- but now I  
14 have to respond to the things that were said.

15 THE COURT: Well, I --

16 MR. MASTRO: So --

17 THE COURT: I fully expect you to.

18 MR. MASTRO: So, your Honor, first, you know, in --  
19 we -- we complained in our opposition, Pages 48 and 49, that a  
20 hotspot analysis is not the same as a conformity analysis.

21 And, your Honor, looking at one county, four hot spots  
22 in one location in New Jersey, just in Hudson leading to the  
23 tunnel, compared to 98 hot spots analyzed in New York. Okay?  
24 This is not a substitute for a conformity analysis, which is  
25 supposed to look at the pre-existing conditions, how they are

1 going to be affected and looking forward, and how you meet the  
2 different standards of --

3 THE COURT: So, Mr. Mastro, help me.

4 MR. MASTRO: -- attainment or nonattainment.

5 THE COURT: I'm going to accept your representation  
6 hotspot analysis differs from a conformity analysis. Let's  
7 probe that a little bit.

8 Is that because they are provided for in two, though  
9 maybe interrelated, parts of the regulations?

10 In other words, you know, there is a part of the scheme  
11 that talks about hotspot analysis. And you have enunciated  
12 standards that have to be applied.

13 And then once that is over with, you turn to a different  
14 part of the scheme to deal with conformity, even though the  
15 hotspot analysis may inform what goes on in the conformity  
16 analysis, but the scheme has set up this demarcation that you  
17 have told the Court should occur?

18 MR. MASTRO: The demarcation we know must occur  
19 because they did it for New York.

20 The explanation that you were given, including by MTA's  
21 counsel going to the very document that describes it, actually  
22 says what was done. The conformity study that was done, the  
23 language that was -- was put before you and it is in our  
24 slides, it is actually quoted, says that it was in  
25 conformity -- excuse me, your Honor --



1 THE COURT: Sure.

2 MR. MASTRO: -- to conform to the New York State  
3 implementation plan. It was not divorced from the New York  
4 State implementation plan. It was conforming with the New York  
5 State implementation plan.

6 And look at New York --

7 THE COURT: So let me ask you this, Mr. Mastro.

8 MR. MASTRO: Sure.

9 THE COURT: Can you get the conformity without a  
10 hotspot analysis?

11 MR. MASTRO: In fact, your Honor, as NEPA makes  
12 very -- I mean as the Clean Air Act makes very clear,  
13 conformity analysis is broader than this. Okay? It is not  
14 limited to just the consideration of hot spots.

15 It is a broader analysis going back historically. It is  
16 not the same analysis.

17 And if they did it for New York, why didn't they do it  
18 for New Jersey? They have done it before.

19 Can we please have the slide to show that they have done  
20 this on a project before.

21 THE COURT: Involving New York and New Jersey or --

22 MR. MASTRO: Yes, involving New York and New Jersey.

23 THE COURT: Okay.

24 MR. MASTRO: Just to point out, your Honor, New Jersey  
25 has much more of a problem in this regard. You just saw New

1 York on the board, there was no nonattainment for any New York  
2 county. Okay? In New Jersey, there is nonattainment for every  
3 category of ozone layer, and they are treading water  
4 maintaining in many other major -- including hot-spots, Hudson  
5 County. So that is exactly why you need to do a conformity  
6 analysis.

7 And, your Honor, we will put up, please, the project if  
8 -- FHWA did this September, 2010. It did an EIS for the Cross  
9 Harbor Freight Program. That is a New York/New Jersey project.

10 And they did a conformity analysis to show conformity  
11 with New York State Implementation Plan and New Jersey State  
12 Implementation Plan.

13 Your Honor, you pointed out exactly where in our letter  
14 we talked about how -- in the governor's letter, he talked  
15 about EPA standards and concern about that.

16 It is obvious that when you are referring to EPA  
17 standards and those particular problems that should have been  
18 obvious to an agency that does this all the time, that you are  
19 talking about such a thing.

20 But then Ms. Knauer said nobody ever raised this issue.  
21 Well, yes, they did. New York State DOT, before we put it in a  
22 comment letter -- go ahead, put it up, please.

23 New York State DOT, in September 2021, writing to the  
24 FHWA said, It's a border issue.

25 New York/New Jersey/Connecticut, and this analysis should be

1 done at those border areas, particularly when it came to,  
2 remember what I said, nonattainment for us -- ozone  
3 nonattainment. How do they do the ozone nonattainment when  
4 New Jersey is nonattaining in every ozone category as opposed  
5 to New York and Connecticut.

6 THE COURT: Mr. Mastro, you raised the magic word  
7 obvious. Obviousness.

8 MR. MASTRO: Yes, your Honor.

9 THE COURT: How is the agency supposed to determine  
10 obviousness? Are there some benchmarks -- objective benchmarks  
11 that provide, shall we say, clues to what could be viewed as  
12 obvious?

13 MR. MASTRO: Two things. Two things.

14 First of all, we don't have to guess. New York's own  
15 Department of Transportation told them this had to be done.

16 THE COURT: That's a fact in this case.

17 But how does one generally figure out whether something  
18 is obvious, which, therefore, should trigger some obligation?

19 MR. MASTRO: I think that it is sufficient for  
20 someone -- a state putting in a letter of comments to refer to  
21 EPA and EPA standards and particular chemicals and particles  
22 that should be studied. I think for a sophisticated agency  
23 like FHWA, that's a trigger. EPA has the Clean Air Act when  
24 you are talking about air particles, ozone layer, and the like.

25 So, your Honor, that's why I think the case law and the

1 *Ilio'ulaokalani Coalition v. Rumsfield* case, 464 F.3d 1083 1092  
2 Ninth Circuit 2006, it says that some things are so obvious  
3 that, quote, There is no need for a commentator to point them  
4 out specifically in order to preserve its ability to challenge  
5 a proposed action.

6 I suggest that pointing out that EPA and the particular  
7 issues in terms of air quality standards, ozone,  
8 particulate 25, being put on notice that New Jersey's concerned  
9 about that and it is not being studied properly should have  
10 triggered the obvious implication that you should do a  
11 conformity study.

12 THE COURT: Do you think these circumstances are on  
13 all fours with the *Ilio'ulaokalani* case?

14 MR. MASTRO: More than on all fours, your Honor,  
15 because of this. New York already told them they had to do to  
16 it and they had to do it for the New York, New Jersey, and  
17 Connecticut borders and including an ozone nonattainment, which  
18 is a New Jersey issue. So they knew it. They just didn't do  
19 it, and that's all I would say, your Honor.

20 THE COURT: Thank you, Mr. Mastro.

21 MR. MASTRO: I really appreciate it, your Honor. I  
22 appreciate your earlier comments, but my brevity occasionally,  
23 I hope, won't be used against me.

24 Thank you, your Honor.

25 THE COURT: Oh, come now. Do you think I would tee up

1 something that would be obvious for an appeal? I think I am a  
2 little bit more experienced than that, Mr. Mastro.

3 Ms. Howard.

4 MS. HOWARD: I do not think I reserved time.

5 THE COURT: That's quite all right. What I do for  
6 one, I do for all.

7 MS. HOWARD: Thank you, your Honor. I will be --  
8 well, attempt to be brief.

9 I wanted to start by discussing the project that  
10 Mr. Mastro pointed out, the Cross Harbor.

11 THE COURT: Are you talking about the prior  
12 New York/New Jersey 2010 Harbor project?

13 MS. HOWARD: Yes, your Honor.

14 THE COURT: Okay. Go for it.

15 MS. HOWARD: First, I would like to point out that  
16 that project was actually sited in both New York and  
17 New Jersey. So there was work being done in both places, which  
18 is why --

19 THE COURT: That is a factual distinction from what we  
20 have here.

21 MS. HOWARD: Yes, your Honor.

22 And, also, that project was in 2010, which is before the  
23 Transportation Conformity Regulations were promulgated in 2012.

24 So now that we have these regulations, we know exactly  
25 what is required on each level, and we have to keep in mind

1 that this is a project, your Honor.

2 Mr. Mastro pointed to EPA's letter and discusses the  
3 plans in that letter. That is not a project. That is not this  
4 project.

5 That is very different and the requirements at that  
6 level, if you will look back at the last page of our  
7 presentation, the table that we discussed, those requirements  
8 are different.

9 The SIP does directly come into play, or State  
10 Implementation Plan, at the plan level and at the TIP level, or  
11 Transportation Improvement Program level.

12 But at the project level, as per the regulations that  
13 were promulgated in 2012, you do a hotspot analysis.

14 So, your Honor, I would just state that the information  
15 that you received from Mr. Mastro regarding the Cross Harbor  
16 project is not applicable in this circumstance. The  
17 regulations tell us what we need to do and Federal Highways did  
18 that, your Honor.

19 Pending your questions, that is all I have.

20 THE COURT: I am good. Thank you.

21 Ms. Knauer.

22 MS. KNAUER: I don't have much, your Honor, either,  
23 but I did just want to note that I think Mr. Mastro has  
24 effectively conceded the legal point and then started talking  
25 about the point concerning the extent of the hotspot analysis

1 that was done. I think we covered that in the air quality  
2 segment of the argument yesterday and earlier this morning, but  
3 I will just point out that those -- the choice of locations for  
4 those analyses are at the discretion of the agency as long as  
5 they are on a reasoned basis.

6 We've explained where in the EA the reasoned basis for  
7 those choices were made, and they did include locations in  
8 New Jersey.

9 I think Mr. Mastro also did not consider in his recent  
10 remarks the location in New Jersey that was specifically  
11 included for highways, which looked at the highway location in  
12 Bergen County, that was -- so it wasn't just the four  
13 intersections that were included.

14 Again, it was based on EPA's guidance under its PM-2.5  
15 hotspot methodology guidance, which explains the use of  
16 worse-case locations and if they pass the -- not exceeding the  
17 standards, you don't need to go further than that.

18 THE COURT: Okay. Thank you, Ms. Knauer.

19 MS. KNAUER: I think that's it, your Honor.

20 THE COURT: Folks, we are at about 3:10. It's been a  
21 long two days.

22 What we have left is remedy and then the Amici arguments  
23 with respect to the substantive topics that we covered today  
24 and then closing arguments.

25 I will give us about a seven to nine-minute break until

1 about 3:20 and then we are just going to plow through until the  
2 end.

3 With a little luck, we will finish up somewhere in the  
4 range of 4:30 to 5 o'clock.

5 So stretch your legs, get some water.

6 Check the facilities.

7 We will see you back here at 20 after.

8 (Recess taken 3:12 p.m. to 3:22 p.m.)

9 THE COURT: Be seated.

10 Folks, we're heading into remedy.

11 Let me just give you all a tiny bit of a head's up.

12 You are going to talk to me about remedy, I think you  
13 need to fully expect that I am going to ask you a question  
14 about putting yourself in my shoes. How do I write what you  
15 are asking me to do?

16 So when you are up here making your presentation about  
17 remedy, other than telling me to flat out affirm, I get it,  
18 that's easy, but if you are asking me to do something  
19 affirmatively, just don't tell it to me. You are going to have  
20 to tell me how I'm supposed to get there.

21 I may ask you a very specific question about what is  
22 that supposed to look like when I sit down to write the  
23 opinion.

24 Mr. Mastro, you are up. Whether we need 40 minutes, you  
25 will tell me.



1 MR. MASTRO: I am going to start with your Honor's  
2 question. Let me just hand these up.

3 Thank you.

4 THE COURT: Now what I just said is not anything  
5 different than what I have said previously.

6 MR. MASTRO: Understood, your Honor.

7 THE COURT: Probably, candidly, is no different than  
8 any of you have experienced in prior cases where a judge says  
9 to you give me a draft order.

10 MR. MASTRO: Your Honor, it is absolutely the case.

11 THE COURT: Let's start with, we planned 40 minutes.  
12 What do you think you really need?

13 MR. MASTRO: Your Honor, I am hoping to do it in less.

14 THE COURT: Well, let's start the clock and reserve  
15 you ten minutes for afterwards.

16 MR. MASTRO: Thank you.

17 THE COURT: You are on the clock.

18 MR. MASTRO: Thank you.

19 You asked the question, what specifically would we like  
20 you to do and the basis for it? We have been spending the past  
21 two days explaining our basis for the arguments we are making,  
22 but, your Honor, the FHWA did not take a hard look at the  
23 congestion pricing scheme because it didn't even have a final  
24 tolling scheme in front of it, which wasn't adopted until last  
25 week. So it could not have considered the full ramifications

1 of the environmental impact of a scheme that changed in  
2 material ways.

3 It did not provide a convincing case in its FONSI  
4 because it found adverse impacts on air quality and in  
5 Environmental Justice communities, 15 of them in New Jersey,  
6 that it then said, for arbitrary reasons I will explain in the  
7 closing, reduced to four, and then it committed no actual  
8 mitigation measures for funding to New Jersey.

9 And -- or any of these communities, including  
10 Bergen County, Bayonne not even considered, Middlesex not even  
11 consider, and the whole 15, not just the four.

12 And, your Honor, the FHWA did not explain how the impact  
13 on the project of New Jersey will be reduced by any mitigation  
14 measures to ameliorate the project's effects because it hasn't  
15 committed any actual mitigation to New Jersey and explained any  
16 actual mitigation to anyplace in New Jersey. It is  
17 fundamentally flawed.

18 Your Honor, it did not take the hard look and do what it  
19 was supposed to do about alternatives because it accepted the  
20 MTA's overriding objective of raising \$15 billion for its  
21 capital program and said that that ruled everything else out.  
22 That was arbitrary capricious, and irrational as well.

23 And, your Honor, we have also pointed out just today the  
24 issues relating to inclusion of New Jersey in the process or  
25 inadequate consultation with New Jersey, I should say, and the

1 Clean Air Act.

2 Your Honor, those are the core components of what we  
3 would like a declaration, that this particular environmental  
4 review did not do adequately, arbitrary, capricious,  
5 irrational, and in violation of law and that there was not --

6 THE COURT: So based on that, Mr. Mastro, you are  
7 asking me, one, for a declaratory judgment.

8 MR. MASTRO: Correct, your Honor.

9 THE COURT: You want that declaratory judgment to  
10 say...

11 MR. MASTRO: I don't -- at the risk of repeating  
12 myself, I want that declaratory judgment to say this particular  
13 environmental assessment and FONSI, a finding of no significant  
14 impact, has to be vacated and remanded for a full --

15 THE COURT: Well, that's different than declaratory  
16 judgment. Declaratory judgment is I am making affirmative  
17 statement that something was unlawful. Right? Or I am  
18 declaring the state of X. Right?

19 So you're saying to me you want a declaratory judgment  
20 declaring that the EA and the FONSI are unlawful or unsupported  
21 by substantial evidence or were unreasonable.

22 MR. MASTRO: Yes, your Honor.

23 THE COURT: And as a consequence of that declaration,  
24 you want me to remand back to the Federal Highway  
25 Administration -- Well, before I say that, do you want me to

1 vacate everything, and tell them to start over?

2 MR. MASTRO: Your Honor, I -- I believe that you have  
3 to vacate the environmental assessment and remand for them to  
4 start over on each of the issues I just described.

5 THE COURT: Okay. So you want a declaratory judgment  
6 and a remand.

7 MR. MASTRO: Absolutely.

8 THE COURT: Whether vacatur is appropriate --well, I  
9 will deal with it.

10 MR. MASTRO: And on each of those issues, your Honor,  
11 you know, there should be a declaration that they did not do  
12 the review necessary under NEPA, and that, therefore, there has  
13 to be a vacatur and a remand. Let me go a little bit into the  
14 law on this, your Honor, because that is a key question here.

15 THE COURT: Are you asking for an affirmative  
16 injunction for the Court to order the agency to do a specific  
17 thing?

18 MR. MASTRO: We are asking that they be enjoined to do  
19 a full environmental review including an environmental impact  
20 statement.

21 THE COURT: Okay.

22 MR. MASTRO: Absolutely.

23 THE COURT: You are looking for an affirmative  
24 injunction.

25 MR. MASTRO: Yes, your Honor.

1 THE COURT: Okay.

2 Continue.

3 MR. MASTRO: And, your Honor, we believe that it is  
4 important --

5 Let's go to the first slide, please.

6 It's important to understand why vacatur and remand are  
7 required. And, of course, we need the injunction, your Honor,  
8 because they are going to pull the switch in mid June. They  
9 are chomping at the bit to pull the switch.

10 THE COURT: An injunction enjoining the MTA from  
11 pulling the switch is different than an affirmative injunction  
12 ordering the Federal Highway Administration to undertake a  
13 particular act.

14 MR. MASTRO: It should be ordered to undertake a  
15 particular act --

16 THE COURT: Right.

17 MR. MASTRO: -- to do a full environmental impact  
18 statement.

19 THE COURT: Right.

20 MR. MASTRO: I want to make -- leave no doubt about  
21 it. And let me explain why.

22 As your Honor well knows, the APA provides that the  
23 reviewing in Court shall hold unlawful and set aside agency  
24 action --

25 (Reporter admonition.)

1 MR. MASTRO: -- agency action findings and conclusions  
2 found to be arbitrary, capricious, and an abuse of discretion  
3 or otherwise not in accordance with law.

4 The case law, including the *Environmental Defense Center*  
5 case, which we cited to you before, and *Humane Society v.*  
6 *Johanns* in the D.C. District Court, the first with being Ninth  
7 Circuit. The appropriate remedy is to vacate the inadequate EA  
8 and that is the presumptive remedy.

9 Vacating a rule or action promulgating a violation of  
10 NEPA is a standard remedy. And it would subvert NEPA's purpose  
11 under the *Standing Rock Sioux* case from the D.C. circuit to  
12 give substantial ammunition to the agencies--

13 (Reporter admonition.)

14 THE COURT: Hold -- hold on. Slow -- slow Mr. --

15 MR. MASTRO: Sorry.

16 THE COURT: I'm going to give you time, Mr. Mastro.

17 MR. MASTRO: Okay.

18 THE COURT: You are the one who is kind of working  
19 against some artificial clock, but let's not make it difficult  
20 for the court reporter, please.

21 MR. MASTRO: Understood. My apologies, Madam Court  
22 Reporter.

23 You don't want to have a situation where the inadequate  
24 EAs -- the inadequate EA stands, and they are working towards a  
25 predetermined out come and, you know, purporting to conduct,

1 quote, unquote, a comprehensive review later. They have to do  
2 the job right.

3 And it's the case, under the case law, you know, that to  
4 do anything less than that would make any new NEPA analysis  
5 merely perfunctory or not actually informative of an agency  
6 decision. It is trying to, you know, put the finger in the  
7 dike, you know, to get past this like a rubber stamp. And  
8 that's not what this Court is supposed to do. I think on this  
9 record there clearly are many issues, mitigation being first  
10 and foremost among them, but also the failure to consider  
11 alternatives. The failure of actually considering the actual  
12 proposal which turns out to be a lot worse in environmental  
13 impacts than any of the scenarios studied. For all of those --

14 THE COURT: Take a breath, Mr. Mastro. Just a tiny  
15 bit.

16 MR. MASTRO: Thank you, your Honor.

17 For all of those reasons, the -- the absolutely correct  
18 remedy here is to vacate and to remand to do a full EIS.

19 Let's go to the next slide, please.

20 The remand without vacatur would be inappropriate  
21 because the FHWA disregarded impacts, didn't provide mitigation  
22 to address them, didn't explain its mitigation to address them  
23 in the sufficient detail that NEPA requires. And they have to  
24 do that, especially for this, a first-in-the-nation  
25 congestion-pricing scheme. That's unprecedented.

1           The deficiencies in this particular EA are so pervasive,  
2 particularly when it comes to mitigation and particularly when  
3 it comes to the fact that the actual proposal that was final  
4 was never even studied and they didn't even consider  
5 alternatives. They have got to do it over and do it right.  
6 There is, yeah, as some cases have said, no possibility.

7           THE COURT: Straight remand with an instruction for  
8 them to do it over without vacatur somehow or other gives the  
9 agency, gives viability to the EA or the FONSI? I'm trying to  
10 understand that.

11           If I declare that what they did was, in short form,  
12 unlawful, and I remand it back to the Federal Highway  
13 Administration to do it again, what does vacatur get us that  
14 those two things don't?

15           MR. MASTRO: I think what it gets us, your Honor, and  
16 I am not quoting from the case law now, but the next slide will  
17 have more case law on this point. I mean, I think where it  
18 gets us is the agency just trying to plug the gaps and not  
19 doing the hard work, the hard look that it was supposed to do  
20 in the first place.

21           When the problems are as pervasive and the flaws that  
22 make this process illegal run so deep, that merely remanding  
23 puts the agency on a course of thinking it can just plug little  
24 gaps. These are not little gaps. This is a plan. You heard  
25 it.



1 THE COURT: Ah.

2 MR. MASTRO: You heard it.

3 THE COURT: So let me see if I can translate this so I  
4 understand it.

5 What you are saying to me is if I just remand, even  
6 though I declared it unlawful, that there is a risk that the  
7 agency would take that which was and correct that which was  
8 fill in the gaps, right, which is different than my saying it  
9 doesn't exist at all and you have to start all over again and  
10 build it out.

11 MR. MASTRO: So, your Honor, yes, but --

12 THE COURT: Good. We have a simple answer.

13 MR. MASTRO: Let me --

14 THE COURT: This is good.

15 MR. MASTRO: Let me, as you know, I like to amplify my  
16 answer.

17 THE COURT: Okay.

18 MR. MASTRO: Your Honor, yes, it would be inadequate  
19 to remand.

20 THE COURT: Alone without vacating.

21 MR. MASTRO: Alone. Not because they can just correct  
22 on the remand. The point is they are working from something  
23 that is fundamentally flawed. We have shown you an example  
24 after example that the choices that were made of where to  
25 study, where to focus, how to do that, how to put the analysis

1 together, how they -- they made these arbitrary irrational  
2 decisions about who, at the end of the day, after all of those  
3 contortions in New Jersey, how few places end up even on their  
4 remediation -- remediation list and mitigation list, that  
5 your Honor, they have to start from scratch. They left whole  
6 New Jersey counties out of their analysis on both air quality  
7 and environmental justice.

8 THE COURT: So you want me to make it go away as if it  
9 never existed and tell the FHWA to start from square one.

10 MR. MASTRO: I want them to start from square one in  
11 taking the data they've collected and then collecting more data  
12 for the areas that they excluded and analyzing them --

13 THE COURT: That's what vacatur gets you.

14 MR. MASTRO: -- all. That's what vacatur gets me.

15 THE COURT: That's what I need to know, Mr. Mastro.

16 MR. MASTRO: Because -- because otherwise, your Honor,  
17 they are just going to try --

18 THE COURT: You are being rescued again.

19 MR. MASTRO: All right. Okay. Well, this is a note  
20 that now that you have seen it, I will read it. I know you  
21 know the answer.

22 THE COURT: You don't have to.

23 MR. MASTRO: So obviously without making sure the  
24 FONSI remains in place, but your Honor can of course enjoin  
25 them from --

1 THE COURT: Right.

2 MR. MASTRO: -- pulling the switch.

3 THE COURT: I got it.

4 MR. MASTRO: So thank you whoever sent me that.

5 Anyway, your Honor, the -- the point is we believe we  
6 have proved in this case the problems run so deep.

7 THE COURT: Well, but that's for your oral argument.  
8 Let's talk about what you want me to do to get to the last page  
9 of my opinion, right?

10 You have told me. You want a declaratory judgment. You  
11 want me to vacate that when exists, and you want me to tell  
12 them to do it anew.

13 What else do you want?

14 MR. MASTRO: And I just want to say one last thing  
15 before I turn it over because I did tell you I want try and be  
16 brief in this presentation.

17 It's not -- there -- there are many Courts that have  
18 held, including the Ninth Circuit in the *Los Padres Forestwatch*  
19 *v. US Forest* 25 F. 4th 649 (2002) just from two years ago that  
20 the reviewing Court may not just remand and dictate to the  
21 agency methods like, you have a certain amount of time to try  
22 and plug the holes in the dike. That's not the way to do this.  
23 If they did it wrong in the first place and there are  
24 fundamental flaws with the analysis, they have to do the  
25 analysis over again. That doesn't mean, your Honor, they start

1 without anything. They have a lot of research. They just  
2 haven't used the base and expanded what they need to do.  
3 Leaving out so many New Jersey counties, so many New Jersey  
4 towns, so many impacts on New Jersey and no explanation for the  
5 actual mitigation that's going to be done in any of them.

6 So, your Honor, that's really all that I have. I will  
7 have a lot to say at closing.

8 THE COURT: Let me make sure I understand something.

9 So you talked to me about the *Los Padres* case. Right?  
10 As I read what you have here, you are not suggesting that I  
11 remand with instructions in a way that directs the agency to do  
12 very specific things. You are asking me to follow the dictates  
13 of the *Los Padres* case, which says I may not do those things.  
14 Correct?

15 MR. MASTRO: Except, your Honor, you have every right  
16 to say they have to do a full environmental --

17 THE COURT: No, no. I understand.

18 MR. MASTRO: -- impact statement.

19 THE COURT: But I can't dictate thing like  
20 methodology, et cetera.

21 MR. MASTRO: No. They -- no.

22 THE COURT: They are charged with the expertise, and I  
23 am supposed to let them utilize that expertise in conducting a  
24 renewed EA/FONSI.

25 MR. MASTRO: Well, actually, your Honor, you can

1 direct them to do a new environmental impact statement.

2 THE COURT: I understand. You're asking me to -- I  
3 can direct them to start the process anew. I can't tell  
4 them -- I can tell them by when the process -- when the remand  
5 has to come back to me, right, but I am not supposed to tell  
6 them the steps and the specific things that they are supposed  
7 to do?

8 MR. MASTRO: Yes. But -- yes. You are not supposed  
9 to tell them you have to do it within three months or things  
10 like that, but you have every right, based on the record here,  
11 showing that there may be significant impacts on New Jersey in  
12 so many ways that have not been accounted for here and have not  
13 been remediated and no explanation of that, the law is crystal  
14 clear under the *Environmental Defense Centers* case that you  
15 can't do a FONSI. You have to a full environmental impact  
16 statement. So you can remand with that instruction.

17 THE COURT: Right. That, I understand.

18 MR. MASTRO: Great.

19 THE COURT: I'm using the EA and the FONSI for -- and  
20 it may be my mistake. I am just using it as shorthand in this  
21 circumstance.

22 MR. MASTRO: I understand. I want to be crystal  
23 clear, your Honor.

24 There are circumstances in which there is a remand with  
25 such an instruction to do a full environmental impact

1 statement. I think that the flaws are so great here that it  
2 should be both a powerful message, findings, and that they have  
3 to do it right this time, that there should be vacature and a  
4 remand, but there are cases that do say -- I am always an  
5 honest broker with this Court, that say remand to do a full  
6 environmental impact statement.

7 THE COURT: I got it.

8 MR. MASTRO: Thank you.

9 THE COURT: You are welcome.

10 Mr. Cumming.

11 MR. CUMMING: Thank you, your Honor. I am going to  
12 approach things slightly differently and provide the Court with  
13 what I think is the analytical framework through which the  
14 Court should determine what remedy would be. We, obviously,  
15 think the Court should rule in favor of defendants, but I am  
16 not going to belabor that point.

17 First, the Court has to decide --

18 THE COURT: Would I expect anything other,  
19 Mr. Cumming? In the words of Mr. Mastro, it is obvious.

20 MR. CUMMING: First, the Court has to -- first, the  
21 Court has to determine whether --

22 THE COURT: Do you want to take a second just to  
23 chuckle, Mr. Cumming?

24 I'm trying really hard, folks, after two days to try to  
25 keep this light and the fact that we've had some intense

1 moments along the way, and I appreciate that you are  
2 cooperating in that regard.

3 MR. CUMMING: First, the Court has to determine  
4 whether the error is harmless. That is the first step in  
5 deciding. So cases -- if there is minor errors, trivial  
6 errors, errors of insignificance, that's the first step.

7 THE COURT: Right. And there is Supreme Court law  
8 that guides the Court on whether something is harmless or not.  
9 Yes?

10 MR. CUMMING: Yes, but I don't have the cite in front  
11 of me.

12 THE COURT: It is all right. It is just a general  
13 question --

14 MR. CUMMING: Yes.

15 THE COURT: -- or comment.

16 MR. CUMMING: Then the Court -- if the Court finds the  
17 error isn't harmless, it has got to decide whether vacatur is  
18 appropriate. The common test across numerous circuits is from  
19 a case called *Allied Signal* in the DC circuit. That has been  
20 applied in the Third Circuit by a case called *Comité de Apoyo a*  
21 *Los Trabajadores Agriculas v. Perez* at 45 F Supp 3d 477 from  
22 the Eastern District of Pennsylvania in 2014.

23 One of the issues in whether vacatur is appropriate is  
24 the likelihood that the agency can reach the same conclusion on  
25 remand. So I don't want to prejudge that question by guessing

1 where the Court may have concerns or not other than to say that  
2 that is, in our view, the critical factor here in how the Court  
3 applies *Allied Signal* and determining whether vacatur is  
4 appropriate.

5 Then, if the Court does decide to remand, it should do  
6 so without specifying a level of review for the agencies  
7 required to make -- to take on remand. In other words, it  
8 should not prejudge how the agencies should go about fixing the  
9 deficiencies identified by the Court.

10 Mr. Mastro's contention that the Court has to order  
11 production of an EIS or should do that, both are incorrect.  
12 There is a case from the Ninth Circuit, *Center for Biological*  
13 *Diversity v. National Highway Traffic Safety Administration*,  
14 538 F.3d 1172 from 2008, where the Ninth Circuit said you  
15 should give the benefit of the doubt to the agency on whether  
16 to redo the EA on remand unless the evidence is so overwhelming  
17 that there was no way the agency could justify its FONSI  
18 finding on remand.

19 That is the lens through which the Court should review  
20 potential remedy in this case.

21 THE COURT: So vacatur would be appropriate if the  
22 Court concluded that under no circumstances the agency could  
23 have reached a conclusion that it did. If the Court finds  
24 otherwise, then the remand. I understand what you are saying.  
25 I got it.



1 MR. CUMMING: The point would be here even if the  
2 Court decides to remand, the agency could determine that a  
3 supplemental EA can fix the deficiencies and if the agency  
4 chooses to do that, gets it wrong, then --

5 THE COURT: There is a review process to fix that.

6 MR. CUMMING: There is a review process.

7 THE COURT: It is the level of specificity in terms of  
8 directing in the remand the certain things the agency must do.

9 MR. CUMMING: Yes.

10 I will also note Mr. Mastro talked about vacating the  
11 EA. I don't believe that's appropriate.

12 The FONSI is the decision document. That is the  
13 document that would be vacated. That is the document that  
14 allows the agency action to take place, the totals to take  
15 place.

16 Mr. Mastro cited to *Los Padres* about whether --

17 THE COURT: So let me kind of come full circle on  
18 that.

19 So final agency action would be triggered by the  
20 issuance of the FONSI, not by the issuance of the EA, and so  
21 that's why, in your view, vacating the FONSI is appropriate,  
22 because that's the decision document that ultimately triggered  
23 judicial review.

24 MR. CUMMING: Correct.

25 THE COURT: Thank you.

1 Continue, please.

2 MR. CUMMING: Mr. Mastro cited to the *Los Padres* in  
3 the Ninth Circuit about how adding a time component on remand  
4 is appropriate.

5 THE COURT: I do remands all the time at the Court of  
6 International Trade. I understand whether one can and cannot  
7 have a time limit on the remand.

8 The answer is we are not remanding into empty space.

9 MR. CUMMING: The Courts are all over the map on that,  
10 as your Honor is well aware.

11 THE COURT: I am well aware of it. Trust me, if  
12 remand is going to happen here, we are not remanding into empty  
13 space. Everybody deserves to understand what's going to happen  
14 next and roughly when. Whether or not we can meet that is a  
15 different story, which would be subject to additional motion  
16 practice for extensions of time down the road. I am not doing  
17 -- trust me. I will say it right now.

18 If a remand is warranted, giant-sized, capitalized I-F,  
19 right, I am not remanding in any way, shape, or form, right,  
20 with an unspecified report-back date.

21 What an appropriate report-back date would be is  
22 something that you all will discuss with me if I get to that  
23 circumstance.

24 MR. CUMMING: Understood.

25 THE COURT: It is not being open-ended because it

1 doesn't serve anybody's purpose here.

2 MR. CUMMING: Understood.

3 THE COURT: You are all entitled to an end point.

4 MR. CUMMING: I think everyone in this case is in  
5 agreement.

6 THE COURT: I don't want to be here when I have great  
7 grandchildren still deciding this case. I have a long way to  
8 go because I have a two-year old and a six-year old  
9 grandchildren.

10 MR. CUMMING: One last point, your Honor.

11 Mr. Mastro quoted the *Standing Rock Sioux* case from the  
12 DC Circuit about how vacatur was necessary because it would  
13 subvert NEPA's purpose.

14 At the time that -- that's the *Dakota Access Pipeline*  
15 case. At the time that decision issued, oil was flowing  
16 through the pipeline. Vacatur was necessary to stop the agency  
17 action.

18 There is -- there are no tolls being collected today.

19 THE COURT: Right.

20 MR. CUMMING: So I don't think that case is comparable  
21 for that reason among others.

22 THE COURT: Very good. Thank you, Mr. Cumming.

23 MR. CUMMING: Thank you, your Honor.

24 THE COURT: Mr. Chertok.

25 MR. CHERTOK: Thank you, your Honor. I will also be

1 very brief.

2 I am not going to go back into the case law, but I think  
3 we just heard, basically, Mr. Mastro's closing summary. I  
4 guess we will hear it again.

5 THE COURT: I did say we are not discussing the  
6 merits. So your hearing is working very well, Mr. Chertok.

7 MR. CHERTOK: Yes, I did.

8 I was just going to say that their proposed remedy is  
9 based on their view of the merits, which we've discussed for  
10 two days and we are not going to repeat. At least, I am not  
11 going to repeat here.

12 THE COURT: Right.

13 MR. CHERTOK: I think there is a couple of other  
14 issues.

15 First of all, the notion that it should be, assuming,  
16 and I will put my big IF on as well, capital I, if there is a  
17 decision that the EA is not -- is arbitrary and capricious,  
18 which we believe the standard and we briefed that, if that's  
19 the finding, the question is if there has to be a remand,  
20 first, is there a vacatur? And I think it depends on the  
21 reason for the decision of arbitrary and capriciousness.

22 For example, if the Court found that there was not a  
23 sufficient explanation, a sufficient connecting of the dots  
24 from A to B for a particular issue, I don't believe that  
25 requires a vacatur as opposed to a remand with instructions to

1 the agency to fill the gap.

2 THE COURT: So in that regard, would you agree,  
3 Mr. Chertok, that if the Court found that there was not an  
4 adequate explanation that the Court is not in a position to  
5 determine whether the EA was arbitrary and capricious or  
6 unreasonable? Because if I don't understand how and why they  
7 got there, how can I determine whether it is or is not  
8 reasonable?

9 MR. CHERTOK: I think that's correct because your  
10 rationale, presumably, would be that there wasn't a reasoned  
11 elaboration of the decision, and you need that to be clarified.

12 THE COURT: So until I get that clarification, I can't  
13 determine whether vacatur is appropriate or not?

14 MR. CHERTOK: That's right. I think that's right.

15 The second point that they made about assuming, again,  
16 it is arbitrary and capricious and it goes to, let's say, a  
17 major issue.

18 THE COURT: Right.

19 MR. CHERTOK: Their notion the reason for an EIS has  
20 all been based, essentially, on mitigation. They want a  
21 commitment of money for specific areas in New Jersey. We've  
22 heard that throughout. Their position is there is no such  
23 commitment. We disagree.

24 That doesn't require an EIS. That is well beyond the  
25 need for an EIS and as Mr. Cumming indicated, there are few

1 cases that remand with a direction to prepare an EIS because  
2 that is, in essence, the Court putting on the agency hat, which  
3 I need not say more about it.

4 I think that's, basically, it. We agree with  
5 Mr. Cumming's analysis. No reason to belabor the point. I  
6 think the fundamental disagreement is on the adequacy of the  
7 EA. We have a difference of opinion with New Jersey, which I  
8 am sure will be expounded upon in the 15 minutes allocated for  
9 summaries.

10 Thank you, your Honor, unless you have any questions.

11 THE COURT: No, I do not. Thank you.

12 I am not going to rebuttal. I think the positions of  
13 the parties are relatively clear. I don't see any need for  
14 rebuttal on remedy.

15 All right. That gets us to Amici.

16 Mr. Mateen, you are first up. Ten minutes with respect  
17 to the substantive issues including remedy discussed today.

18 MR. MATEEN: Thank you, your Honor.

19 Defendants -- defendant interveners were required to  
20 involve local governments to the extent practical. A review of  
21 the record is not reveal -- reveal a shred of evidence of any  
22 outreach to Bergen County or any Bergen County officials or any  
23 localities in Bergen County.

24 THE COURT: Now, tell me where I can find that  
25 standard, "a shred of evidence." Is that a term of legal art?

1 MR. MATEEN: It's a term of art. Not legal art.

2 THE COURT: No. So -- so there is no scintilla of  
3 evidence. Right?

4 MR. MATEEN: Correct.

5 THE COURT: Okay.

6 MR. MATEEN: I do note that in defendant intervenor's  
7 reply brief they had a footnote where it says in a proposed  
8 Amicus brief, Bergen County argues, parentheses, wrongly that  
9 FHWA failed to conduct outreach in Bergen County. In fact,  
10 public meetings and other information were advertised in the  
11 Bergen record and two of the EA repositories were in Bergen  
12 County.

13 The repositories are listed under 37058 through 61. And  
14 there was only one Bergen County location where the draft EA  
15 was made available to the public. And that was the Bergen  
16 County clerk's office. It is not two like they said. The EA  
17 incorrectly claims that the North Bergen Free Public Library --

18 THE COURT: So it is your view that that posting in  
19 one locale in Bergen County made the notice inadequate?

20 MR. MATEEN: Correct, your Honor. The North Bergen  
21 Free Public Library is not located in Bergen County. EA says  
22 it is.

23 THE COURT: Is there a mandate as to the minimum  
24 number of required places for posting for notice?

25 MR. MATEEN: Not that I am aware of, your Honor.

1           THE COURT: Okay. So you are saying the exercise of  
2 the agency's discretion in this circumstance was abusive in the  
3 fact that it -- it basically only posted in one locale in  
4 comparison to other counties?

5           MR. MATEEN: Yes, and especially because the results  
6 of the study show that Bergen County will see the most adverse  
7 impacts. And I don't think one location is enough to -- to get  
8 that information out to the residence of Bergen County who will  
9 be affected by any action the agency takes.

10           So -- was there a question, your Honor?

11           THE COURT: Maybe, but I will let you continue.

12           MR. MATEEN: But I -- I would concede that the error  
13 to the list that the North Bergen Free Public Library is  
14 located in Bergen County. It is actually located in Hudson  
15 County. I would say that is harmless error in the draft  
16 environmental assessment.

17           Ultimately, we do agree with the remedy sought by the  
18 state of New Jersey. We fully support the arguments they set  
19 forth today.

20           And we thank your Honor for the time and consideration.

21           THE COURT: You are welcome, Mr. Mateen. Thank you  
22 for your engagement.

23           I do not see Mr. Nagel. So the question is, Ms.  
24 Matloff, are you making the presentation?

25           MS. MATLOFF: Yes, it is going to be extremely brief,



1 your Honor.

2 In support of the other plaintiff Amici. And we're just  
3 going to adopt the position of our noble colleagues both with  
4 respect to the remedy and with respect to the merits.

5 THE COURT: Thank you, Ms. Matloff.

6 Mr. Reichman, I assume I pronounced that correctly. Is  
7 it, Richman (phonetic)?

8 MR. REICHMAN: It is actually Reichman.

9 THE COURT: No, that's fine.

10 MR. REICHMAN: I will answer to either.

11 THE COURT: You know what, I stand corrected. I  
12 apologize for mispronouncing your name to begin with.

13 Mr. Reichman.

14 MR. REICHMAN: Thank you, your Honor.

15 I will also be taking far less than ten minutes.

16 Let me turn to the issue of public participation.

17 Now, we previously showed that New Jersey's position  
18 regarding the need for an EIS whenever there is a highway, its  
19 position with respect to environmental justice, its position  
20 with respect to alternatives cannot be squared at all with its  
21 actual practices and policies with respect to its own \$10.7  
22 billion highway expansion project.

23 The same inconsistency and I would say hypocrisy extends  
24 to the issue of public participation as well.

25 As we laid out in our Amici brief, the state has refused

1 to have any public participation of any meaningful kind with  
2 respect to the Turnpike expansion. As also refused to actually  
3 even have participation, allow the participation of -- of  
4 Jersey City. This is the place where the bulk of the -- of the  
5 Turnpike expansion --

6 THE COURT: Mr. Reichman, I appreciate the passion  
7 that you are bringing, but this is an apples-and-oranges  
8 comparison. The Court does not have the New Jersey Turnpike  
9 Bay Bridge extension project before it.

10 I'm dealing with the decisions from the Federal Highway  
11 Administration. Now, I am more than happy to listen to  
12 anything that you have to say in support. If you want to tell  
13 me that the State of New Jersey is taking an inconsistent  
14 position with respect to matters in this matter I got it.  
15 Right?

16 I gave you a lot of leeway earlier today on this. I'm  
17 not inclined at this juncture to give you the same leeway. You  
18 want to tell me something that's relative to the arguments made  
19 today, and the issues before the Court today, I am all ears. I  
20 will give you my hundred percent attention.

21 MR. REICHMAN: Your Honor, let me respectfully push  
22 back on that for a minute.

23 So much of the argument today has been -- and yesterday  
24 has been based -- based on past practices of a party. Is  
25 what --

1 THE COURT: No. No, that's agency practice. Right?  
2 Because agency practice creates expectations.

3 Now, are you saying Mr. Mastro is barred from making the  
4 comments and arguments that he has made today because  
5 New Jersey has acted differently in a different project?

6 MR. REICHMAN: Yes, I am, your Honor. I think --

7 THE COURT: He is barred from making the argument --

8 MR. REICHMAN: Barred -- barred is too strong, but I  
9 think it certainly relevant information.

10 THE COURT: All right. Mr. Reichman, I will give you  
11 a little bit of leeway here --

12 MR. REICHMAN: Okay.

13 THE COURT: But not much.

14 MR. REICHMAN: All right. Well, let me -- you know, I  
15 understand where the Court coming from. So let me briefly talk  
16 about remedy and address something that Mr. Mastro said in his  
17 remedy argument.

18 He basically is saying that there are so many negative  
19 impacts throughout New Jersey and so many ways that essentially  
20 you have to blow the -- the whole process up.

21 And the fact of the matter is, Honor -- your Honor, I  
22 have sat here for two days. You have listened to two days of  
23 argument. And really, it is all vomit. There is a single  
24 place in Bergen County, okay, which is affected by truck  
25 traffic because there is conceivably going to be more truck

1 traffic going over the GW Bridge. They have not shown negative  
2 impacts anywhere else in the state. And I think the -- and  
3 Federal Highways did a great job yesterday afternoon going  
4 through all of the areas in New Jersey showing it. Including  
5 the areas like Hudson County where there will be far better  
6 improved air, cleaner air, as a result of the tolling program.

7 So my only suggestion, your Honor, is that any remedy  
8 short of affirmance should reflect the fact that there is a  
9 very tiny problem that conceivably would need to be remedied  
10 here. And there is not negative impacts throughout New Jersey.

11 In fact, what would be negative is if this project was  
12 not allowed to go forward, it would negatively effect the 75  
13 percent of commuters who go into New York. It would negatively  
14 affect the air that most of New Jersey breathes. And it would  
15 negatively affect New Jersey's ability to reach its climate  
16 goals.

17 THE COURT: Thank you, Mr. Reichman.

18 MR. REICHMAN: Thank you.

19 THE COURT: Mr. Otis.

20 MR. OTIS: Thank you, your Honor.

21 After two full days of discussion --

22 THE COURT: How well we all know that.

23 MR. OTIS: Yes, I intend to be extremely brief.

24 With regard to participation, look, my clients actively  
25 participated in the process. They have had no complaints about

1 the amount of available participation. You saw a list of  
2 environmental justice organizations, it included one that  
3 participated in the advisory group. It included one of my  
4 clients. So they are perfectly fine with the participation  
5 process thus far.

6 With regard to remedy, your Honor. Obviously, we think  
7 that your drafting should be relatively simple, dismissed and  
8 affirmed. And that's it.

9 But I think it is important that your Honor consider  
10 when deciding what sort of remedy to incur here that there is  
11 an ongoing problem. Right? There is an ongoing congestion  
12 problem. There is an ongoing pollution problem. Think of it  
13 as a 102 hours of lost time and \$1595 per driver per year.  
14 This is from DOT\_36197 in the EA that is happening per driver,  
15 every day in the CBD and it needs to be changed. My clients  
16 feel like they have been working on this for 45 years. Right?

17 So they feel like this is some -- a discussion that's  
18 been going on for a long time. There has been enough. They  
19 are ready to move forward.

20 And with that, I thank your Honor, unless you have any  
21 questions.

22 THE COURT: I have no questions, Mr. Otis. Thank you  
23 very much.

24 MR. OTIS: Thank you.

25 THE COURT: Okay. Ladies and gentlemen, we are at the

1 point in time where I perceive there are two or three things  
2 left.

3 One is the closing arguments. Two, to deal with the  
4 issue of all of the PowerPoint-esque presentations. And any  
5 final comments from me or requests from the parties.

6 I'd like to suggest that we take about a three-minute  
7 stretch break. Everybody can kind of get fresh air into their  
8 lungs, so to speak. And then we will come back at about 4:10.  
9 And we will push through to the end.

10 (Recess taken 4:05 p.m. to 4:10 p.m.)

11 THE COURT: Mr. Mastro, you are on the clock.

12 MR. MASTRO: Thank you, your Honor.

13 THE COURT: Seven minutes.

14 MR. MASTRO: I think it was supposed to be 10, your  
15 Honor.

16 THE COURT: No. I sent a document out, you all signed  
17 off on it. It was seven, four, and four.

18 MR. MASTRO: Oh, I am sorry, your Honor.

19 Yes, seven, four, and four. I'm sorry. I apologize.

20 THE COURT: You are on the clock. You are already  
21 five seconds in.

22 MR. MASTRO: Thank you, your Honor. Thank you, your  
23 Honor.

24 I -- I just want to say at the outset, how grateful we  
25 are on behalf of the State of New Jersey that you have given us

1 so much time, you and your entire team and we are extremely  
2 grateful for that.

3 Your Honor --

4 THE COURT: You are very welcome. Thank you for the  
5 compliment on behalf of my team. I appreciate it.

6 I have been greatly served by them and the fact that you  
7 recognize what they've done to enable me to be ready to  
8 participate these last two days, the fact that you are  
9 recognizing it is greatly appreciated.

10 MR. MASTRO: It comes from the heart, your Honor.

11 Thank you.

12 Your Honor, so much has been said. I don't want to  
13 repeat myself. And I did go through some of the merits on the  
14 remedy section. But there are some things that -- that need to  
15 be said because I left this courtroom last night and I heard  
16 some things about, you know, passions run deep on both sides.  
17 But I literally received dozens of emails, even calls -- I  
18 don't know how they got my number -- people calling to thank  
19 me, to thank the governor whose staff is here, to say thank you  
20 for standing up for New Jersey. I am proud. My team is proud  
21 and I am so proud of them for standing up for New Jersey.

22 THE COURT: You're -- after yesterday's hearing  
23 appearance in front of television cameras didn't generate that  
24 outpouring of affection?

25 MR. MASTRO: I -- I suspect it did after -- after

1 Ms. Kaplan --

2 THE COURT: Well --

3 MR. MASTRO: -- told the press she was going to win.

4 THE COURT: Listen, I am an equal opportunity  
5 commenter.

6 And if Ms. Kaplan and Ms. Knauer and Mr. Chertok stand  
7 up and tell me that they got hundreds of e-mails and phone  
8 calls, I'm going to say the exact same thing.

9 MR. MASTRO: There you go. I went after them, your  
10 Honor.

11 To make a long story short, your Honor. I want to focus  
12 on some of the key elements here. Because the reason why  
13 vacatur and remand is appropriate here, and I understand with  
14 some guardrails, but the reason why there has to be a full EIS  
15 is because that is what the law requires when you have so many  
16 significant impacts. That is what Ninth Circuit said just two  
17 years ago, not that older case that Mr. Cumming cited, but an  
18 EIS must be prepared if there are substantial questions  
19 regarding whether an agency's proposed action may have  
20 significant impacts, end quote. That's the *Environmental*  
21 *Defense Center* case.

22 Your Honor, they basically now have been admitting in  
23 respect after respect after respect in their presentation -- I  
24 mean, my worthy adversaries -- that there are significant  
25 impacts here potentially that need to be mitigated.



1 I have now heard them say -- even though their EA and  
2 FONSI don't say it -- oh, yeah, we're going to -- we're going  
3 to get to mitigation later. There -- there is going to be  
4 mitigation coming down the road. The old trust me, New York.  
5 New Jersey is supposed to trust New York.

6 Your Honor, this is the pivotal point. And even with  
7 that record, where first we had 15 -- go ahead. Put them up.

8 First we had 15 cities in three counties out of four  
9 studied. We didn't have Middlesex studied, we didn't have  
10 Passaic studied. We didn't have a lot of counties studied in  
11 New Jersey compared to New York, but we had 15 where this  
12 particular EA says -- says they may need mitigation.

13 And then in what I will explain is arbitrary, okay,  
14 they -- they narrow it to four because they don't want to have  
15 to mitigate much in New Jersey.

16 And even then all they say about the four, Fort Lee,  
17 East Orange, Newark, and City of Orange, is that they could  
18 merit place-based mitigation.

19 Well, where are the explanations for these things?  
20 They -- they funded the Bronx, came up with 35 million for the  
21 Bronx right off the bat. Right?

22 Nothing committed for New Jersey.

23 It is not just about -- New Jersey is not asking for a  
24 dollar amount. New Jersey is asking for mitigation, as is the  
25 legal obligation under NEPA of FHWA to ensure, and the MTA to

1 provide for their project because you have to mitigate what may  
2 be significant environmental impacts.

3 And you have to do a full EIS when there may be  
4 significant impacts, and they basically stood up here and  
5 admitted to you that there are.

6 They are trying to limit the universe because they want  
7 to spend less of the MTA's money.

8 I understand, your Honor.

9 They want to spend less of the MTA's money. But what  
10 was the explanation?

11 Now, your Honor, we talked about the doctrine of  
12 post-hoc rationalizations. And one thing that has been  
13 painfully apparent here is the MTA has been running the show,  
14 not the FHWA. Because we heard Ms. Knauer tell us that, oh,  
15 the reason why the Bronx got all that money is because there  
16 was so much more problems in the Bronx. So they stood up and  
17 said that's why we gave the Bronx money now. And the  
18 New Jersey communities we will figure out later.

19 Guess what? Where is that in the EA? Where does it say  
20 the rationale for giving the Bronx mitigation -- let's go to  
21 the next slide -- is because they have so many problems, more  
22 than anybody else. It is not there. You won't find it.

23 And, your Honor, she also --

24 THE COURT: "She" is whom?

25 MR. MASTRO: Ms. Knauer. She also told you,

1 your Honor, Ms. Knauer, that the EA, the reason why those --  
2 those 11 cities in New Jersey got taken off the list is because  
3 the regional mitigation measures would supposedly satisfy them.

4 And she said that it was the change from "or" to "and"  
5 that you had to have both pre-existing conditions, pollution  
6 and chronic disease, over the 90th percentile. And that  
7 explains -- that is what the EA explains. Right?

8 Guess what? Show me where that is. That is nowhere in  
9 there. These are post-hoc rationalizations to try and get the  
10 dollar figure down for mitigation, but that is not the way it  
11 works.

12 The way it works, your Honor, and the FHWA told us -- go  
13 ahead -- the FHWA told us "or." "Or," pollutants or chronic  
14 disease. And that that's where the mitigation was going to go.  
15 That is at least those 15 New Jersey towns.

16 And, your Honor, the point of mitigation is not to do it  
17 to a dollar figure, like this EA is doing to a dollar figure.

18 The point is to do it, this is what the FHWA is telling  
19 you what the standard is. Not the "and" that Ms. Knauer said.  
20 The "or."

21 And you have 15 New Jersey cities. And you have other  
22 places not even studied. And the point of mitigation is not to  
23 mitigate to a dollar figure. The point of mitigation is to  
24 mitigate everywhere that you need to, to address what may be  
25 significant impacts. This EA is completely deficient in those

1 regards.

2 New Jersey will suffer environmentally in so many  
3 communities. And this is not the way the federal government or  
4 the MTA should have conducted itself.

5 Your Honor, we beseech you, we implore you to put a stop  
6 to this. Make the FHWA and the MTA do it right and commit the  
7 resources that are necessary to ensure there will not be  
8 significant impacts in New Jersey. That's what NEPA requires.  
9 That's what we are asking for.

10 And we are so grateful to you for your consideration.  
11 Thank you, your Honor.

12 THE COURT: You are welcome, Mr. Mastro. Thank you.

13 I am going to go slightly out of order.

14 Mr. Chertok or Ms. Knauer, who is going to make the  
15 close?

16 MS. KNAUER: Mr. Chertok.

17 THE COURT: I am going to go with defendant intervenor  
18 first.

19 And then I am going to give Mr. Cumming, as the defender  
20 of the agency decision, the last word.

21 MR. CHERTOK: Thank you, your Honor. I will also echo  
22 Mr. Mastro's appreciation for the time and effort you have put  
23 in and the patience you have exhibited over the last two days,  
24 including with me.

25 THE COURT: You are very kind, Mr. Chertok. It is

1 much appreciated. And on behalf of my team, we say thank you  
2 to you, too, as well.

3 MR. CHERTOK: So let -- let's talk -- I have four --  
4 four or five minutes, as I recall.

5 THE COURT: Yes, sir.

6 MR. CHERTOK: So one -- this is a critical project for  
7 the region. Even New Jersey doesn't deny that. It will  
8 provide environmental, transportation, air quality, economic  
9 benefits for the entire region.

10 I would note that the National Environmental Policy Act  
11 was amended to make sure that it is explained what would happen  
12 if a project that benefits the environment is not approved. So  
13 there is a flip side here. New Jersey only talks about the  
14 supposed inadequacy of the assessment in terms of  
15 municipalities, primarily in Bergen County. The fact is  
16 there's a major benefit for the region as a whole.

17 The revenues that are part of the purpose and need for  
18 this project, and which are critiqued repeatedly by New Jersey  
19 as inappropriate to consider, are there for a reason. Not only  
20 will transit improvements help New Jersey residents. They will  
21 also, obviously, help New York residents.

22 But they go to the capital plan, which are improvements  
23 like making stations ADA-compliant. Fixing over the -- the  
24 over 100-year-old infrastructure of the subway system in New  
25 York City, so that it can serve the general public, not just

1 New Yorkers.

2           Three, and I am going to go a little bit on the merits  
3 here, there is no -- New Jersey's position, that there was no  
4 hard look taken. And they keep on repeat -- you know,  
5 referring to these various figures, which they are trying to  
6 manipulate. But the fact is the methodology that was used was  
7 the same for every part of the region.

8           And if there was a reduction in the number of  
9 potentially affected communities, that was because the modeling  
10 and the methodology used by an expert agency yielded that  
11 result.

12           There was no foregone conclusion to make sure we cut New  
13 -- that FHA -- FHWA cut New Jersey out of the formula. That  
14 just doesn't exist. And that just is a conspiracy theory that  
15 really has no place in this Court.

16           They talk about the so-called alternatives analysis.  
17 But, of course, they never raised it when they could have.

18           They complain about the actual project. But as we  
19 discussed yesterday, there is going to be a re-evaluation that,  
20 of course, New Jersey wants to preempt because they want to  
21 have, essentially, the Court substitute for the agency.

22           None of that is proper.

23           The passion that New Jersey shows is admirable, but it  
24 doesn't substitute for hard, legal analysis. And the fact is,  
25 beyond the fact that New Jersey waived -- waived virtually all

1 of their claims by purposely not participating in this process.

2 Putting that aside for a moment, their arguments on the  
3 merits are extraordinarily weak. They just cannot show that  
4 this very detailed and exhaustive EA did not take a hard look  
5 at the consequences and the environmental impacts of congestion  
6 pricing.

7 And, yes, the analysis was so biased that FHWA  
8 recognized some potential environmental impacts and has  
9 provided mitigation for them. If the -- if the interest was in  
10 avoiding that, there would be no recognition of such impacts  
11 and no commitment to \$155 million.

12 Your Honor, in our view, the -- the matter is easily  
13 resolved. As one of the Amici said, it should be affirmed.

14 Thank you.

15 THE COURT: Thank you, Mr. Chertok.

16 Mr. Cumming.

17 MR. CUMMING: Thank you, your Honor.

18 First I would like to thank the Court, the courtroom  
19 staff, marshals, court reporter for their time over the past  
20 two days.

21 Regardless of the outcome, we appreciate the fulsome  
22 opportunity to defend and explain the agency's position.

23 THE COURT: Thank you for your recognition of the  
24 team. On their behalf, we say thank you.

25 MR. CUMMING: This Court has had -- heard two sets of

1 arguments over the past two days. One is based on the record,  
2 precedent, and the applicable statutes and regulatory  
3 authority.

4 The other is based on cherry-picked citations to the  
5 record that were presented out of context and intended to serve  
6 political expediency and manufacture errors in the record.

7 The Court should only give credence to the former.

8 This is because NEPA is not a vehicle to resolve  
9 political disputes, policy differences, or confer a state to  
10 veto power over a federal agency action.

11 As the Second Circuit has eloquently stated, NEPA was  
12 not intended to place Courts in the position of resolving what  
13 it termed fervid disagreements about the wisdom of  
14 transportation programs.

15 Similarly, under the NEPA standard of review, Courts  
16 have repeatedly refused to flyspeck the agency's findings in  
17 search of a deficiency. Instead, NEPA is intended to inform  
18 decision-makers and the public.

19 The final EA more than meets that standard and we would  
20 ask the Court to grant summary judgment to defendants on all  
21 counts.

22 Thank you.

23 THE COURT: Thank you, Mr. Cumming.

24 Ms. Howard and Mr. Chertok, you have raised concerns  
25 about the electronic information and other paper documents



1 presented to the Court throughout this process. In order --  
2 well, you have raised concerns.

3 And, frankly, all of the parties have presented  
4 documentation to the Court. Whether it is within bounds or out  
5 of bounds, that depends upon your own perspective.

6 I made a brief comment yesterday about how I intend to  
7 handle it, but I am more than willing to spend a few minutes to  
8 hear if you have other concerns and suggestions with respect to  
9 how I deal with all of the material presented to the Court by  
10 the three main parties in support of their oral presentations  
11 throughout the past two days.

12 I have some additional comments, depending upon what you  
13 all present to me, which may give you some further insight as  
14 to how I intend to approach this. But I am willing to hear  
15 anything that you have to say one way or the other and any  
16 suggestions that you need to make.

17 Mr. Chertok, you were the first person to raise the  
18 concern. I am more than happy to hear what you have to say.

19 MR. CHERTOK: Thank you, your Honor.

20 Based on the most recent set of slides, we have 141  
21 pages of PowerPoint presentation. In essence, this is almost  
22 three briefs at the 50-page limit that was -- that had been  
23 submitted by the plaintiff.

24 And they have cherry-picked material. Some of it is  
25 from the record. Some of it is their colloquy.

1           So must -- much -- or most, perhaps, because it is a  
2 little hard to go through 141 pages overnight, most of this is  
3 not part of the record.

4           The other presentations, I believe, are pages from the  
5 record. It is quite different to submit a page from the  
6 administrative record for the convenience of the Court as  
7 opposed to -- and the other parties -- as opposed to putting in  
8 material that is not part of the record and, indeed, raises  
9 arguments that were not even raised in the briefs that were  
10 submitted.

11           So I --

12           THE COURT: I appreciate that, Mr. Chertok. What do  
13 you want me to do?

14           MR. CHERTOK: I think it ought to be put in your  
15 circular file, your Honor.

16           THE COURT: Thank you, Mr. Chertok.

17           MR. CHERTOK: Thank you.

18           THE COURT: Ms. Howard or Mr. Cumming.

19           MR. CUMMING: First, we trust your Honor is well  
20 familiar with what is the record and not, but two points on the  
21 Clean Air Act and remedy --

22           THE COURT: Boy, are you gullible, Mr. Cumming.  
23 Yes, I know what is in the record.

24           MR. CUMMING: -- on Clean Air Act and remedies to the  
25 extent that those are -- were sur-reply-ish, I will call them.

1 THE COURT: Right.

2 MR. CUMMING: We would certainly -- to the extent the  
3 Court feels it needs to rely on them, we obviously request the  
4 opportunity to respond in writing as appropriate, if that need  
5 arises.

6 THE COURT: Okay.

7 MR. CUMMING: Thank you.

8 THE COURT: Mr. Mastro.

9 MR. MASTRO: Well, I was hoping to end on a kumbaya  
10 moment, your Honor.

11 THE COURT: Well, you never know, Mr. Mastro. I am  
12 still the ringmaster. You never quite know.

13 MR. MASTRO: There you go.

14 As your Honor knows, when something was presented that  
15 was outside the record earlier today, I pointed out it was  
16 outside the record and said, But this is argument. They can  
17 put up whatever they want and the Court can give it whatever  
18 weight it is worth.

19 I have never had a case in my life, your Honor, where I  
20 haven't used slides for a closing or major argument. I have  
21 had cases with Mr. Chertok where I had exactly the same kind of  
22 presentations and he loved them, but now --

23 THE COURT: You actually know each other?

24 MR. MASTRO: We do. We know each other well.

25 When I'm on his side, he loves those kind of slides.

1 And, by the way, your Honor --

2 THE COURT: He still loves you, you know.

3 MR. MASTRO: I understand.

4 THE COURT: You are friends. What you do for a living  
5 is different than what you do on the personal side of the  
6 equation.

7 MR. MASTRO: It is not personal, your Honor. It is  
8 just business.

9 But to come to the point, every single statement -- many  
10 of them are just blow-ups from the record, but every single  
11 statement or quote is from a case or from the record and gives  
12 the record citation. It is intended as an aid to the Court,  
13 but the Court can give it whatever weight or not, but to have a  
14 motion that it should be --

15 THE COURT: There is no motion. It is just commentary  
16 at the moment.

17 MR. MASTRO: There you go.

18 To say it should be put in the round file, that is  
19 really up to your Honor.

20 I have no problem with what they did. I have no problem  
21 with that they did. I think the slides maybe were a little too  
22 effective in their view, but we will leave that aside.

23 Your Honor is going to make a ruling at the end of the  
24 day, and I don't think it is going to be based on what slides  
25 Mr. Chertok, and Ms. Knauer, and the FHWA team used.

1 I think it is going to be based on your review of the  
2 record, and these were simply intended as an aid to the Court.

3 So with that kumbaya moment, I hope we can all go home.

4 THE COURT: Not quite, Mr. Mastro.

5 I didn't make a comment on this yesterday.

6 Whether one might believe that I would take it for what  
7 it is worth as illustrative or demonstrative, that is part of  
8 my thinking.

9 The other part of this is while this was not a trial, I  
10 am very used to running bench trials without a jury and when  
11 there are objections to testimony or documentary evidence based  
12 on hearsay I am not going to instruct myself like I would a  
13 jury. But the lawyers are supposed to trust that I know enough  
14 to differentiate between that which is hearsay and that which  
15 is not.

16 Frankly, folks, at the end of the day, that's exactly  
17 what I am going to do here.

18 If, in fact, I think that there is something that I am  
19 going to look at -- I didn't say rely on -- there is something  
20 that I'm going to look at that I believe require s some  
21 additional comment in response, you know what I'm going to do.  
22 You are going to get an email from Ms. Creegan or  
23 Ms. Featherstone, and we are going to have a conversation, and  
24 I am going to explain to you what my concern is, and I am going  
25 to give you an opportunity to help educate me.

1           So you have to trust me at my word, folks, that I know  
2 what I'm doing. I know what to ignore and what not to ignore.

3           That is how I am going to handle this.

4           If you believe in any way, shape, or form that that is  
5 not sufficient, speak now or forever hold your peace.

6           MR. CHERTOK: From my perspective, we are comfortable  
7 with that, your Honor. I think it is important to point out  
8 that these are -- I am not sure I call them effective. I call  
9 them very dense, however.

10          Thank you.

11          THE COURT: Well, if we want to hold a session on what  
12 is the appropriate use of PowerPoint and how to present it and  
13 how many words or lines should be on a page and how big the  
14 font should be, I am more than happy to do this because I do a  
15 lot of CLE presentation work, and I know what's effective and  
16 what isn't in terms of visuals, but that is your choice.

17          Anything else before the Court makes some closing  
18 comments?

19          MR. MASTRO: No, your Honor.

20          MR. CHERTOK: No, your Honor.

21          THE COURT: Ladies and gentlemen, we have been  
22 together here for two full days. We have had several sessions  
23 before, status conferences, and we all have gotten to know each  
24 other.

25          I may have seemed a bit harsh at times in terms of how

1 we were going to get through these two days. Trust me, having  
2 parameters makes people think about what they are going to say  
3 and how they are going to present it.

4 Trust me. I did not hold you to the specifics of  
5 10 minutes, or 20 minutes, or 40 minutes, or seven minutes. I  
6 ran the clock, but there was always give and flexibility on my  
7 side.

8 I tried to comport myself in such a way that I made sure  
9 that I was fair and even-handed to everybody in terms of  
10 presentation time, even to the point where you may have  
11 perceived that I cut you off a little bit, particularly at the  
12 end of the day or a break -- a significant break point in the  
13 session, to provide additional time for you to feel like you  
14 fully presented your argument.

15 I deeply believe in courtesy, dignity, and respect.

16 I very much appreciate the significant degree to which  
17 you accorded that to each other and to the Court.

18 Yes. Every once in a while, because we are humans, I  
19 had to pull the reins a little bit, but all of it was intended  
20 to get us to a point where we can get done at a reasonable  
21 point in time each day and get through the material.

22 If you believed in any way, shape, or form that I  
23 overstepped, that I somehow insulted you or offended you, you  
24 have my deepest personal apology. None of this was personal.  
25 It was all business, and it was intended to get us through a

1 significant amount of material in a reasonable period of time  
2 or else we would be here for a lot longer.

3 I am deeply appreciative of the time and effort that you  
4 all put in to your briefs, to your presentations, to answering  
5 my questions, to bantering back and forth with me, to entering  
6 into a colloquy. The more conversational this was, the more  
7 instructive and helpful it was to me.

8 Candidly, when I teach law school classes, that's  
9 exactly how I do it. Conversation spotlights important things  
10 and enables people to understand.

11 I told you at one point there are things about how I run  
12 my show that are probably different than you have seen in a lot  
13 of other judges. At the end of the day, it is a process that  
14 works for me. I hope that it worked for you.

15 I am going to do my best to keep my word once we go  
16 adjourn today.

17 I know what the timeline is. It is roughly June 15th.  
18 I know that you have obligated yourselves -- particularly, MTA  
19 counsel -- to advise the Court if there is any significant  
20 change in that timeline.

21 I am going to do my best and if I can't, I'm going to  
22 let you know that I can't.

23 My team and I are going to do the best that we can to  
24 get a decision out in sufficient time before the June 15th  
25 deadline.



1 I can't tell you whether that's May 1st, May 15th,  
2 June 1st, June 10th, but I'm not going to issue it at a point  
3 in time where you have to stay up all night to figure out what  
4 I said in order to figure out what the next steps are. I will  
5 do it in a sufficient amount of time to be respectful to all of  
6 you so you can figure out what you need to do next whatever  
7 that next may be.

8 If I have any concerns beforehand, you will get notice  
9 from me and we will have a subsequent conversation.

10 The Court is deeply indebted to all of you for the time  
11 and effort that you put in, both in paper, in preparation, and  
12 over the last two days to educate me. I can't do what I need  
13 to do without that.

14 So I say thank you to you all.

15 I will ask one last time, any questions?

16 If there are none, Mr. Mastro, I am seven minutes late  
17 to get you out of the building to your important board meeting  
18 in Philadelphia.

19 MR. MASTRO: Thank you, your Honor.

20 THE COURT: It will be my distinct pleasure, whatever  
21 the outcome here, to have any and all of you before me at  
22 another case in the future. If we are back together again  
23 because of however this case ends, so be it. If not, I look  
24 forward to seeing you again under whatever the circumstances  
25 may be.

1 I very much enjoyed our two days together. I say  
2 thank you and I am deeply appreciative.

3 MR. MASTRO: Thank you, your Honor.

4 MR. CHERTOK: Thank you, your Honor.

5 MS. KNAUER: Thank you, your Honor.

6 MR. CUMMING: Thank you, your Honor.

7 (Whereupon the proceedings are adjourned at 4:38 p.m.)

8 \* \* \*

9 FEDERAL OFFICIAL COURT REPORTER'S CERTIFICATE

10  
11 I certify that the foregoing is a correct transcript  
12 from the record of proceedings in the above-entitled matter.

13  
14 /S/ Melissa A. Mormile RDR, CCR, CRCR

04/04/2024

15 Official Court Reporter

Date

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*United States District Court of New Jersey*

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***/s/ Melissa A. Mormile 05/22/2024***

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I certify the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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I certify the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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United States District Court of New Jersey

I certify the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ **Melissa A. Mormile** 05/22/2024

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United States District Court of New Jersey

I certify the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ **Melissa A. Mormile** 05/22/2024

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I certify the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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United States District Court of New Jersey

I certify the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ **Melissa A. Mormile** 05/22/2024

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I certify the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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United States District Court of New Jersey

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United States District Court of New Jersey

I certify the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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*United States District Court of New Jersey*

*I certify the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.*

**/s/ Melissa A. Mormile 05/22/2024**